Supreme Court, U.S.
FILED

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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

JAMES N. STEPHENS,

Petitioner,

v.

SECRETARY, DEPARTMENT OF HEALTH AND HUMAN SERVICE

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Did the Court of Appeals err by failing to apply clear precedent of this Court *(Alexander v. Gardner-Denver)* to deny civil rights claimants their day in court?

A.

Whether the Eleventh Circuit screening panel use of 11th Cir. Rule 36-1 to uphold the district court opinion was erroneous and the case should be remanded to the Eleventh Court for further evaluation in light of the Supreme Court's decision of *Alexander v. Gardner-Denver.*

B.

Whether the district court opinion and the Eleventh Circuit affirmance of denial of rehearing is in conflict with *Alexander v. Gardner-Denver's* determination that the same policy reasons for rejecting the doctrine of election of remedies and waiver in the context of Title VII are equally applicable to res judicata.

C.

Whether the affirmance of the Eleventh Circuit is in conflict with the decision of the Sixth Circuit in *Lyght v. Ford Motor Co.*

D.

Even if res judicata were applicable to EEOC claims, whether the Eleventh Circuit decision affirming the district court's application of res judicata is in conflict with the Seventh Circuit in *Hermann v. Cencom Cable Associates, Inc.* denouncing the "but for" use of res judicata in a retaliation claim.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, James N. Stephens, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit issued on November 9, 1993, as to which a rehearing was denied on January 7, 1994.

OPINIONS BELOW

The decision of the Court of Appeals is attached as Appendix A. The opinion of the district court for the Northern District of Georgia is attached as Appendix B.

JURISDICTION

The per curiam decision of the Court of Appeals for the Eleventh Circuit was issued on November 9, 1993. On November 30, 1993, petitioner filed his Suggestion of Rehearing En Banc which was denied on January 7, 1994. Petitioner, within ninety days of the denial of the Suggestion of Rehearing En Banc, files this petition for certiorari.

The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

HHS PERSONNEL INSTRUCTION MANUAL 771-3-50-0

Complaints of discrimination are excluded from grievance coverage by OPM Regulation 771.206(c)(ii). Accordingly, a grievance concerning a matter or matters about which the employee has filed a formal complaint of discrimination must be rejected, either wholly or partially as appropriate. (When an employee submits a grievance on more than one matter but files a formal discrimination complaint on less that all matters of the grievance, only those matters for which discrimination has been alleged must be rejected).

11TH CIR. R. 36-1

Affirmance Without Opinion. When the court determines that any of the following circumstances exist:

(a) judgment of the district court is based on findings of fact that are not clearly erroneous;

(b) the evidence in support of a jury verdict is sufficient;

(c) the order of an administrative agency is supported by substantial evidence on the record as a whole;

(d) summary judgment, directed verdict, or judgment on the pleadings is supported by the record;

(e) judgment has been entered without a reversible error of law;

and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

11TH CIR. R. 36-2

Unpublished Opinions. Unpublished opinions are not considered binding precedent. They may be cited as persuasive authority, provided that a copy of the unpublished opinion is attached to or incorporated within the brief, petition, motion or response in which such a citation is made. A majority of the panel must agree to publish an opinion which was initially issued as an unpublished opinion.

STATEMENT OF THE CASE

(i) Course of Proceedings and Disposition Below

Petitioner filed a class action seeking relief both on behalf of himself and all other non-bargaining unit employees of the Department of Health and Human Services (HHS). The complaint alleges that he, as well as others similarly situated, have been punished by HHS' secret blanket policy of rejecting grievances when a discrimination claim is also filed; and consequently HHS' policy chills the filing of discrimination claims by grievants, in violation of its own personnel manual (Appendix G).

Health and Human Services responded with a motion to dismiss on the ground of res judicata. The motion, converted to a motion for summary judgment by the district court, was granted. The district court denied, as moot, Stephens' motion for class certification. The Court of Appeals for the Eleventh Circuit affirmed the district court under 11th Cir. R. 36-1, and denied petitioner's Suggestion of Rehearing En Banc.

(ii) Statement of Facts

James N. Stephens had been Deputy Regional Attorney for Health and Human Services Region IV, consisting of eight states, since 1974. Upon the retirement of the Regional Attorney in 1985, Mr. Stephens was named as Acting Regional Attorney. However, over six months later after satisfactory service as Acting, another attorney was appointed to the vacancy of Regional Attorney. The background of the original personnel action is more fully set out in the opinion in *Stephens v.*

Department of Health and Human Services, 901 F.2d 1571 (11th Cir. 1990). As indicated in the foregoing opinion, Stephens filed a grievance challenging defects in the advertisement, selection, and certification of the Regional Attorney selectee. That was the initial personnel action challenged and the basis for the initial district court action seeking review under the Administrative Procedures Act (APA). Not indicated in the previous opinion are subsequent personnel actions relative to Stephens which were challenged administratively. He later applied for the new position of Chief Counsel - SES, which was created upon the conversion of the Regional Attorney position to the Senior Executive Service. Stephens grieved defects in his non-selection for this position, this being a second and different personnel action from that alleged in the complaint originally before the district court. Next followed a new personnel action: the elimination of Stephens' position as Deputy Chief Counsel, a personnel action limited to Region IV, thus singling out Stephens. Several months later, two newly created positions of Deputy Chief Counsels were created in Region IV. Stephens applied for both of these, and upon not being appointed, grieved selection defects. One selectee had no supervisory experience as required in the announcement. These appointments constituted two additional personnel actions.

The grievances[1] were generally rejected and all denied reconsideration on the ground that Stephens also filed age discrimination complaints arising out of the

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[1] As used hereafter grievance (grievant) refers to the administrative action of filing a personnel grievance pursuant to 5 U.S.C. 1302, 5 C.F.R. 771 et seq, and the Department's Personnel Instruction Manual.

same personnel action,[2] even though each grievance made no discrimination allegation and was strictly confined to defects in the selection process unrelated to discrimination. The filing of a grievance is the only way in which a prohibited personnel practice in violation of the Civil Service Reform Act can be corrected by the agency. EEOC has no jurisdiction to consider prohibited personnel practices except by the separate filing of an EEO complaint alleging discrimination. However, many prohibited personnel practices exist without a discrimination component and these must be challenged in a grievance. Therefore, for Stephens to effectively challenge a personnel action employing a prohibited personnel practice, as well as age discrimination, it was necessary to file both a grievance and an EEOC complaint. Rejection of the individual grievances for the reason that he had also filed a discrimination complaint in each of the personnel actions caused Stephens to file EEOC retaliation complaints which were numbered OSH-68-87 and OSH-55-89 by Health and Human Services.

Stephens filed his individual retaliation complaint under 29 C.F.R. 1613.261 which states that it is unlawful to discriminate against complainants "because of involvement with a discrimination charge." 29 C.F.R. 1613.607(a), under which he later filed his administrative class complaint, contains the same protective

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[2] As used hereafter complaint and claim/claimant refer to the action of filing a claim of discrimination (i.e. EEOC claim) pursuant to the Civil Rights Act or the ADEA and 29 C.F.R. 1613 et seq.

language. These retaliation complaints were also rejected by the agency, but the EEOC required the agency to process the complaints and issue a decision on the issue of retaliation (Appendix C - D). The retaliation complaints were not decided during the course of the prior district court litigation in which the agency based its motion to dismiss on the doctrine of res judicata.

Eventually responding to the EEOC orders, the agency completed its report of investigation (ROI) on the retaliation complaints and on March 27, 1991, forwarded a copy to Stephens in OSH-68-87 (filed on November 21, 1986) and OSH-55-89 (filed on November 1, 1988). The ROI, containing the affidavit of John S. Bowers, revealed that, as a matter of policy, the agency rejects all grievances when it discovers that any discrimination claim by a grievant is pending related to the same personnel action. The policy was hitherto secret, neither having been declared in or by the publication of any rule, regulation, or personnel manual provision nor being referred to in any personnel action or decision involving Stephens or other actions taken in cases cited by the agency as indicative of its blanket policy. HHS policy indicates that only portions of a grievance which allege discrimination must be rejected. HHS Personnel Instruction Manual 771-3-50-0.

On April 22, 1991, within 30 days of being forwarded the ROI containing Mr. Bowers' affidavit, Stephens sought informal counseling for the purpose of initiating a class complaint against the policy, as required by 29 C.F.R. 1613.602.

Stephens submitted a class petition on the ground that he, as well as others similarly situated, was retaliated against and injured by the agency's secret illegal policy of refusing to process an EEO claimant's grievance if a discrimination complaint was pending which arose out of the same personnel action.

Stephens timely mailed the class petition to the Department on June 13, 1991. The agency issued a final decision on or about May 1, 1992, rejecting the class petition, and granting thirty days from receipt of the notice in which to file an action in district court. (Appendix E).

ARGUMENT FOR GRANTING WRIT

A.

The Eleventh Circuits screening panel's use of 11th Cir. Rule 36-1 to uphold the district court opinion was erroneous and the case should be remanded to the Eleventh Circuit for further evaluation in light of the Supreme Court's decision of *Alexander v. Gardner-Denver.*

B.

Alexander v. Gardner-Denver determined that the same policy reasons for rejecting the doctrine of election of remedies and waiver in the context of Title VII are equally applicable to res judicata and thus the district court opinion and the Eleventh Circuit affirmance and denial of rehearing is in conflict with an applicable decision of the Supreme Court.

C.

The affirmance of the Eleventh Circuit is in conflict with the decision of the Sixth Circuit in *Lyght v. Ford Motor Co.*

D.

Even if res judicata were applicable in the context of Title VII, the Eleventh Circuit decision affirming the district court's application of res judicata is in conflict with the decision of the Seventh Circuit in *Hermann v. Cencom Cable Associates, Inc.*

which disapproved and remanded for further evaluation the district court's inadequate application of res judicata.

A.

The Eleventh Circuit screening panel's use of 11th Cir. Rule 36-1 to uphold the district court opinion was erroneous and the case should be remanded to the District Court for evaluation in light of the Supreme Court's decision of Alexander v. Gardner-Denver.

The issue presented is a very serious matter of civil rights enforcement.

The district court dismissed Petitioner's newly discovered claim that he, and others who had filed grievances and discrimination claims with HHS, had been discriminated against by a secret policy, contrary to the published Departmental policy, to reject all grievance reconsiderations when a discrimination claim was also pending. The district court applied res judicata in opposition to the clear language of the decision in *Alexander v. Gardner-Denver Co.*, 415 U. S. 36, 94 S. Ct. 1011, 39 L. Ed. 2d 147 (1974), which was briefed and orally argued to the district court. It states that the doctrine of res judicata should not prevent a claimant from pursuing independently rights under both Title VII and other state and federal statutes. The district court failed to mention, much less attempt to evaluate *Alexander, supra.*

Petitioner had previously filed a suit not under the Civil Rights Act, Title VII or ADEA, but under the

Administrative Procedures Act (APA) to contest irregularities in the selection process for appointment to a federal job. The federal courts determined that a remedy was no longer available under the APA to contest grievances in the judicial forum; that the Civil Service Reform Act was now the exclusive remedy for federal employees, and because it provided no judicial remedy, there was none for Stephens.

In the former APA action, enactment of the CSRA deprived Petitioner of an hitherto recognized judicial remedy to contest a grievance decision. In the present action, the lower federal courts have deprived Petitioner, and other federal employees likewise situated, the right to even lodge an administrative grievance. The admitted reason is that Petitioner's grievances are rejected because he had filed an EEOC claim.

Even though Petitioner only discovered the existence of the unpublished HHS policy (blanket rejection of all grievance reconsiderations[3] when the employee had also filed a discrimination claim) after the agency was required by the EEOC to investigate appellant's retaliatory discrimination complaint, and even though this discovery was after the ruling of the federal court on the APA case, the Court of Appeals in face of *Alexander, supra*, affirmed the dismissal of Petitioner's complaint on the ground of res judicata.

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[3] The agency has not asserted that its policy is limited to rejections of grievance reconsiderations but states it in such a manner that the policy could result in dismissal of the personnel grievance at any stage of the administrative grievance procedure. In fact, Petitioner's stage one grievance was dismissed in one personnel action on the basis that he had filed a discrimination claim involving the same personnel action.

The unpublished HHS policy to reject grievance reconsiderations, if a discrimination claim also was pending, without examining the grievance to determine if it related to the subject matter of the discrimination complaint punished Petitioner and other discrimination claimants. The policy cuts off their access to a hearing on their grievances which was available to other employees who had not filed discrimination complaints. Therefore, the policy solely punished discrimination claimants by limiting their opportunity to contest a separate personnel matter or condition of employment through the grievance process afforded by federal regulations. A discrimination claimant, e.g., cannot contest selection defects in the appointment for a position in a discrimination case, but must do this in a grievance, and likewise a grievant cannot claim discrimination grounds to obtain relief. The processes are mutually exclusive, and as a result the Petitioner's grievances were rejected and he was denied an opportunity to seek their reconsideration because, as the appropriate agency official stated, Petitioner had a discrimination claim pending.

There is no reason or sound policy justifying this dilemma for the federal employee who is forced to either challenge a personnel action such as a non-selection on strictly procedural grounds (grievance) and waive discrimination grounds, or waive all procedural errors (grievance) in order to file a discrimination claim. This policy of the HHS chills the filing of discrimination claims and the civil rights of HHS employees who have filed or considered filing either a grievance or discrimination claim.

The decision of the Supreme Court in *Alexander* issued by Justice Powell bridges the pitfall of res judicata which the district court determined Petitioner must cross over to receive a hearing on the merits. The Court of Appeals declined Petitioner's request for oral argument on an issue critical to enforcement of civil rights of federal employees and issued a per curiam affirmance under 11th Cir. R. 36-1.

Under this rule, the screening panel had to determine that the affirmance would have no precedential value. Presented with a serious matter of civil rights enforcement, the screening panel should have explicitly analyzed *Alexander* in light of Petitioner's contentions. By failing to grant oral argument or write an opinion, federal district court precedent ignoring the highest law of the land was allowed to stand in a case seeking class relief. The screening panel of the Court of Appeals erroneously used 11th Cir. R. 36-1 to uphold without oral argument or opinion a district court opinion which failed to evaluate the precedent of the Supreme Court in an area critical to the civil rights of federal employees.

An affirmance without opinion in the Eleventh Circuit, under 11th Cir. R. 36-2 is not considered "binding precedent," but may be cited as "persuasive authority." If this rule were construed to discourage or prevent the grant of certiorari in an affirmance without opinion, a lower federal court rule, not a statute, would set practical limits on certiorari jurisdiction. For those with causes before the federal courts, this would be extremely prejudicial and proliferate disunity in federal law among the circuits establishing such a rule.

Whether res judicata should be applied to the Petitioner's civil rights claim could be appropriately determined by the Eleventh Circuit's articulate consideration of this matter in light of *Alexander*. Cf. *Dennison Mfg. Co. v. Panduit Corp.*, 457 U.S. 809, 811, 106 S.Ct. 1578, 89 L. 2Ed. 2d 817 (1986).

B.

Alexander v. Gardner-Denver determined that the same policy reasons for rejecting the doctrine of election of remedies and waiver in the context of Title VII and EEO are equally applicable to res judicata and thus the district court opinion and the Eleventh Circuit affirmance and denial of rehearing is in conflict with an applicable decision of the Supreme Court.

Justice Powell stated in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 94 S. Ct. 1011, 39 L. Ed. 2d 147 (1974):

> "(L)egislative enactments in this area have long evinced a general intent to accord parallel or overlapping remedies against discrimination....Consistent with this view, Title VII provides for consideration of employment-discrimination claims in several forums....And, in general, submission of a claim in one forum does not preclude a later submission to another. Moreover, the legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes."

94 S. Ct. at 1029, 415 U.S.at 47-48.

Footnote 9 of the *Alexander* opinion cites legislative history to the effect that "Title VII is not intended to and does not deny to any individual rights and remedies which he may pursue under the Federal and State statutes." The same footnote of the Supreme Court opinion adds: "Moreover, the Senate defeated an amendment which would have made Title VII the exclusive federal remedy for most unlawful employment practices. And a similar amendment was rejected in connection with the Equal Employment Opportunity Act of 1972."

The EEO scheme adopted by Congress provides a procedural route winding in and out of the agency, the EEOC, and the courts. However, the agency grievance procedure is not part of that procedure, being limited to the decision and review processes of the agency, which is prohibited from reviewing EEO claims. *See generally* Part 771, 5 C.F.R. The agency grievance process plays no role in the congressional EEO scheme of civil rights enforcement. It should have no preclusive effect on an EEO claim for retaliation even if, *arguendo*, the doctrine of res judicata were applicable in the context of EEO claims.

In commenting on the rationale of the district court and its cited authority, which was reversed in *Alexander*, Justice Powell stated at footnote 10: "Whatever doctrinal label is used, the essence of these holdings remains the same. The policy reasons for rejecting the doctrines of election of remedies and waiver in the context of Title VII are equally applicable to the doctrines of *res judicata* and collateral estoppel. (Emphasis supplied).

The Eleventh Circuit Court of Appeals has decided a federal question in conflict with an applicable decision of this Court, and certiorari should be granted for this reason.

C.

The affirmance of the Eleventh Circuit is in conflict with the decision of the Sixth Circuit in *Lyght v. Ford Motor Co.*

The decision of the Eleventh Circuit has decided this case in conflict with the decision of the Sixth Circuit in *Lyght v. Ford Motor Co.*, 643 F.2d 435 (6th Cir. 1981).

The *Alexander* opinion prompted the Sixth Circuit Court of Appeals in *Lyght, supra* to conclude:

> It is settled law that the doctrine of *res judicata*, collateral estoppel and election of remedies normally do not apply in Title VII actions (at 438).

In *Lyght* there was a settlement between the Michigan Civil Rights Commission and Ford granting a promotion and transfer. While Lyght accepted the benefits of the settlement, he did not receive any back pay which he had originally claimed. The Court of Appeals, relying on *Alexander*, determined that he was not precluded from seeking back pay in a Title VII action. These cases show, even though identical claims were involved, which is definitely not the situation in this case, that the doctrine of res judicata was not applied where a separate anti-discrimination remedy was available.

The Eleventh Circuit decision conflicts with the decision of the Sixth Circuit, and presents another reason for the grant of certiorari.

D.

Even if res judicata were applicable in the context of Title VII, the Eleventh Circuit decision affirming the district court's application of res judicata is in conflict with the decision of the Seventh Circuit in *Hermann v. Cencom Cable Associates, Inc.* which disapproved and remanded the district court's inadequate application of res judicata.

Petitioner Stephens and others who may in the future have the fortitude and perseverance to oppose a punitive policy against discrimination claimants are entitled to a full examination without being tripped up and thrown off the *Alexander* bridge, constructed for sound policy reasons as a passage for civil rights claimants over the pit of res judicata.

The facts of the discrimination claims raised by Stephens in the present action germinate from a different nucleus of operative fact than those facts arising from the grievance claims in the prior APA suit. The grievance claims arose from the use of improper personnel procedures and prohibited personnel practices. The discrimination complaints arose from the allegations of age discrimination and the retaliatory efforts to punish Stephens and other EEO claimants by rejecting any grievances whether related or unrelated to allegations of age discrimination. Stephens' allegations of age discrimination arose independently of the grievance grounds and from a factual basis that typically arises from a claim of age discrimination, e.g. no regional attorney had been previously chosen over the age of 40, and other facts and statistics of this kind such as the unrebutted practice of

appointing Deputies as regional attorney except where the Deputy was over the age of 40, as in Stephens' case. Stephens alleged in his EEO claim that his non-selection resulted because he was perceived as too close to long time Regional Attorney, Carl Harper, and because he failed to give information helpful to the central office in its determination to force Harper's retirement, which was eventually accomplished. After Stephens' non-selection, his then position of Deputy Chief Counsel was abolished, but several months later two new Deputy Chief Counsel positions were created. Though he applied, Stephens was chosen for neither though one of the appointees had no prior supervisory experience, which had been stated as prerequisite for the position. Those allegations are not found in the earlier grievance litigation because they were confined to the EEO claim.

The allegations of the present EEOC retaliation claim arose from a wholly different nucleus of operative facts. While one or more operative facts might be the same, an analysis of all significant operative facts has not been made to justify preclusion. The agency did not carry its burden of proof in its Motion to Dismiss, as converted to a Motion for Summary Judgment, to establish by any form of evidence, affidavit, records, or otherwise, that the EEO claim and the grievance arose from a common nucleus of operative facts. To do so, it would have to do more than make adversarial assertions, or incorporate pleadings and prior federal decisions (which do not reach the merits of the grievance allegations). There is no similar incorporation of the EEO complaints and decisions for comparative purposes, the agency even objecting to two decisions of the EEOC being attached as appellate exhibits in the Eleventh Circuit. The agency's

motion afforded the district court insufficient evidence related to the factual allegations of the discriminatory retaliation claim to factually analyze whether there existed a common nucleus of operative fact to bar a discrimination complaint by res judicata.

The district court oversimplified the diverse factual basis for the APA suit arising directly from Petitioner's non-selection as Regional Attorney, on one hand, and the present discrimination claim, on the other hand, by determining that "both the captioned case and the prior suit arose from plaintiff's allegations that his grievance was wrongfully denied because of his having also filed a discrimination complaint." The APA suit arose directly from the non-selection, and from the procedural errors in the selection process alleged in a grievance. Petitioner does not now seek a hearing on the irregularities alleged in the selection of a Regional Attorney, but on the retaliatory conduct arising subsequent to the discharge and subsequent to determination of the APA action. Only in a "but for" sense, can it be said that the discrimination claim now raised was out of the same nucleus of operative fact. Admittedly, but for the non-selection, the retaliatory action would not have arisen. However, a "but for" test begs the question. The issue should be whether the retaliatory action is a different claim arising from mostly different facts. Here the retaliation arose when *after* the non-selection, and *after* subsequent personnel actions adverse to Petitioner, the agency rejected Petitioner's grievance because he had filed discrimination claims. See *Hermann v. Cencom Cable Associates, Inc., infra*, 999 F2d at 227.

The operative facts of the EEOC retaliation claim are generally separate from the operative facts of the APA suit just as the grievance process is designed to be wholly divorced from the EEO process. Stephens has adhered to these bifurcated procedures, but is foreclosed from using the EEO procedure to assert retaliation in a wholly separate EEO claim which is intended to be judicially reviewable. The district court erred by concluding that the retaliatory claim, relating to personnel actions subsequent to the non-selection, arose from a common nucleus of operative facts.

The contention that appellant should have joined in prior litigation all claims then existing, even if he did not discover the departmental policy of discrimination and retaliation against those who filed or might have considered filing discrimination claims when their grievance was pending, should fail also for another reason. HHS adopted a secret uniform practice on grievance rejection, which was unknown to Stephens, grievants and discrimination claimants. Stephens knew only that his own grievances had been rejected for having filed EEO claims, and had no basis for knowing that this was a uniform practice until after the EEOC ordered the agency to investigate his allegation of retaliation and the information was afforded to him in the investigative report.

The conditions for applying equitable tolling exist where agency action is taken pursuant to a policy that exceeds the scope of any published regulation. In *Bowen v. City of New York*, 476 U.S. 467, 106 S. Ct. 2022, 90 L. Ed.2d 462, 476 (1986), HHS' secretive policy in administration of social security benefits prevented plaintiffs' from knowing of a violation of rights, and the Supreme Court applied the traditional equitable tolling principle.

In the case at bar, a secret, unpublished policy was in existence. HHS should be estopped as a matter of policy from claiming in this case that res judicata applies where an unpublished policy prevented Stephens from knowing that the agency uniformly to punished discrimination claimants who also filed grievances.

Petitioner garners no solace from the Seventh Circuit's dictum in *Hermann v. Cencom Cable Associates, Inc.*, 999 F2d 223 (7th Cir. 1993). Judge Posner approved the district court's application of res judicata to a Title VII claim. However, the Seventh Circuit opinion embraces the Supreme Court's decision in *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 95 S.Ct. 1716, 44 L. Ed.2d 295 (1975) as a dead ringer for *Alexander v. Gardner-Denver Co., supra. Johnson* applied a statute of limitation to a 42 U.S.C. § 1981 case, by holding it was not tolled by Title VII administrative remedies. The *Johnson* decision did not apply judicially fashioned res judicata or collateral estoppel to defeat the § 1981 claimant, but applied an appropriate state statute of limitation. Moreover, the *Johnson* court approvingly restated the elements of *Alexander v. Gardner-Denver Co.* relied upon by Petitioner. See *Johnson, supra*, at 457-459.

Despite approving the use of res judicata in a Title VII claim, the Seventh Circuit's holding in *Hermann* remanded the case to the district court for further evaluation of the res judicata defense. The analysis capsulates Petitioner's unfortunate plight:

> It is like the typical retaliation case, in which an employee files a claim based on some set of facts and then the employer fires him for filing the claim, precipitating a second claim. They are two claims, not one, for purposes of res judicata. [citations omitted] While it is true in such a case that, but for the filing of the first claim, there would not have been a second claim, the two claims are based on (largely) different facts: the first claim on whatever facts gave rise to that claim, the second claim on the filing of the first claim and the employer's response to the filing. (at 227).

While it might be argued that there is some factual overlap in Petitioner's case, there has been no analysis by the Eleventh Circuit to gauge the nature and extent of the differences or overlap.[4] The case should be remanded for this evaluation. A judicially fashioned bar to the enforcement of civil rights should not be locked tight without analysis or written opinion.

A harsh judicial application of res judicata in the context of Title VII and ADEA will block civil rights enforcement in cases strongly and sometimes dilatorily defended by agency officials before the agency, EEOC, and the courts. After months and years of litigation, these cases will be vulnerable, as the present case, to the now fashionable doctrine of res judicata.

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[4] The agency conceded in its "Agency Motion for a Decision Without a Hearing" before the EEOC that Stephens' allegation concerning the denial of his request for reconsideration of the rejection of his grievance on July 24, 1988, would not be barred by res judicata (Appendix H, 12).

CONCLUSION

It is requested that a writ of certiorari be issued to the Court of Appeals for the Eleventh Circuit for review of the issues presented in this petition, or alternatively grant the petition for certiorari and remand to the Eleventh Circuit Court of Appeals for further evaluation of res judicata in light of *Gardner v. Alexander, supra*, and whether the doctrine of res judicata should be a bar in this case, even if theoretically applicable.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 93-8507
Non-Argument Calendar

D.C. Docket No. 1:92-cv-1302-WCO

JAMES N. STEPHENS, individually,
and as class representative,

Plaintiff-Appellant,

vs.

DEPARTMENT OF HEALTH AND
HUMAN SERVICES,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia

(November 9, 1993)

Before FAY and BIRCH, Circuit Judges, and TUTTLE, Senior Circuit Judge.

PER CURIAM: AFFIRMED. See 11th Cir. R. 36-1.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JAMES N. STEPHENS,	:	
INDIVIDUALLY AND AS	:	
CLASS REPRESENTATIVE,	:	
PLAINTIFF	:	
VERSUS	:	CIVIL NO.
	:	1:92-cv-
	:	1302-WCO:
SECRETARY, DEPARTMENT OF	:	
HEALTH AND HUMAN SERVICES,	:	
DEFENDANT	:	

ORDER

The captioned case is before the court on defendant's motion to dismiss for failure to state a claim upon which relief can be granted and on plaintiff's motion for class certification. As defendant has predicted the motion to dismiss on documents filed in support of the motion, the motion will be treated as a motion for summary judgment pursuant to Rule 12(b), Fed. R. Civ. P. Following a hearing on these matters and after careful review, the court grants defendants' motion for summary judgment [5-1] and denies as moot plaintiff's motion for class certification [8-1].

FACTUAL AND PROCEDURAL HISTORY

In 1985, the Department of Health and Human Services ("HHS") announced an opening for the position of regional attorney. Plaintiff, then deputy regional attorney and acting regional attorney, applied for the position, but it was awarded to another applicant.

Plaintiff filed a grievance with the office of General Counsel ("OGC") objecting to certain procedures used in the selection process. This grievance was denied on the basis that grievances for nonselection for promotion were excluded from grievance coverage. Plaintiff filed a second, amended grievance which was also rejected. Plaintiff then requested formal grievance processing, including an investigation and hearing. During this time, while he had grievances pending, plaintiff filed an EEO discrimination complaint alleging age discrimination in the selection process. When plaintiff was denied an investigation and hearing of his grievance, he requested reconsideration which was denied because he had filed an EEO discrimination complaint on the same matter. Plaintiff then filed individual EEO complaints of retaliation for his having filed a discrimination complaint.

Plaintiff also filed two law suits in the United States District Court, one against HHS and one against Terry Coleman and Isabel Dunst, two members of the OGC who had served on the selection board which denied plaintiff the promotion. Both suits were dismissed. The suit against Coleman and Dunst was dismissed under Rule 12(b)(2) for lack of personal jurisdiction and under Rule 12(b)(6) for failure to state a claim because the court

found that a federal employee's exclusive remedies are those provided under the Civil Service Reform Act ("CSRA"). The suit against HHS was also dismissed under Rule 12(b)(6) because of CSRA exclusive remedies. Both decisions were appealed that the Administrative Procedure Act was violated and did not allege a violation of Title VII of the Civil Rights Act. However, plaintiff did include in his complaint allegations of improper denial of his grievances and he specifically alleged that reconsideration of the grievance was denied because of his having filed a discrimination complaint, in violation of 5 C.F.R. §771.302(c)(1) assuring freedom from reprisal.

When plaintiff learned of the HHS policy of rejecting *all* grievances arising form the same personnel action about which a discrimination claim had been filed, plaintiff filed an EEO class complaint of discrimination. The class complaint was rejected for three reasons: 1) it was not within the purview of 29 C.F.R. §1613.601 *et seq* which regulates discrimination based on race, color, religion, sex, national origin, age or handicapping condition; 2) the complaint was not timely filed; and 3) the necessary numerosity was not shown. Plaintiff was told in the letter rejecting his complaint that he had thirty (30) days within which to appeal the decision or file a suit in the United States District Courts. Plaintiff filed the captioned class action complaint against HHS alleging that HHS's policy of denying a grievance if the grievant had filed a discrimination complaint constitutes retaliation in violation of Title VII of the Civil Rights Act and in violation of administrative due process.

MOTION TO DISMISS

Allegations of Defendant

HHS filed a motion to dismiss the complaint under Rule 12(b)(6) alleging that the complaint is barred by res judicata. HSS argues that all four elements required for res judicata exist: 1) a final judgment on the merits, 2) by a court of competent jurisdiction, 3) identical parties, and 4) the same cause of action. HHS argues that, for purposes of res judicata, a dismissal under Rule 12(b)(6) is an adjudication on the merits; that in the Eleventh Circuit, the test for the same cause of action is whether the claims arose form the same nucleus of operative facts; and that filing the second action as a class action does not defeat the application of res judicata. HSS further argues that the purpose of the doctrine of res judicata is to prevent piecemeal litigation and that, although plaintiff may not have known of the specific claim included in this litigation at the time he filed his prior suits, he did include in the prior suits allegations of the specific problem - denial of his grievance because of the filing of his discrimination complaint.

Allegations of Plaintiff

Plaintiff argues that his prior suits were not heard on the merits but were dismissed on jurisdictional grounds; that he did not learn of this cause of action until after the prior suits had been dismissed; that this is a class action suit whereas the prior suits were only individual complaints; that the parties in his suit against Coleman and Dunst were not identical to the parties in this suit; that this is a wholly separate claim as he did not allege violations of Title VII in the prior suits; and that this action is based on the "unstated" policy of denying all grievances based on the same personnel action about

which a discrimination complaint was filed whereas the prior suits were based on the "stated" policy of denying those parts of a grievance about which a discrimination complaint was filed.

APPLICABLE LEGAL STANDARDS

Motion to Dismiss

Rule 12 provides that where a party moves for dismissal of a pleading for failure to state a claim upon which relief can be granted and references matters outside the pleading, " the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all materials made pertinent to such a motion by Rule 56." Fed. R. Civ. P. 12(b). In the captioned case, defendant filed a motion to dismiss for failure of the complaint to state a claim upon which relief was granted, alleging that the claim is barred by res judicata, and referenced prior complaints and judgments involving the same parties. In responding to defendant's motion, plaintiff noted that defendant had gone "outside the record in this case." Plaintiff's Brief in Response to Defendant's Motion to Dismiss at 2. Defendant replied by suggesting that the court must treat the motion to dismiss as a motion for summary judgment. Defendant's reply to Plaintiff's Response to Defendant's Motion to Dismiss at 2. In its Order of March 9, 1993, granting plaintiff's request for a hearing, the court notified both parties that the motion to dismiss would be treated as a motion for summary judgment.

Summary judgment is only proper when 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material

fact that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Because the procedure deprives the parties of a trial on the issues, the court must be careful to ensure that only those claims for which there is no need for a factual determination as to any material fact are disposed of by summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). In the captioned case, both parties agree on the material facts but disagree as to the conclusions to be drawn from the facts.

Res Judicata

The doctrine of res judicata provides that "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Allen v. McCurry*, 449 U.S. 94 (1980) (citing *Cromwell v. County of Sac*, 94 U.S. 351, 352 (1877)). "Res judicata prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, *regardless of whether they were asserted or determined in the prior proceeding*. Res judicata thus encourages reliance on judicial decisions, bars vexatious litigation, and frees the courts to resolve other disputes." *Brown v. Felsen*, 442 U.S. 127, 131 (1979) (emphasis added). "Res judicata refers to 'the preclusive effect of a judgment in foreclosing relitigation of matters that should have been raised in an earlier suit.'" *Thomas v. Evans*, 880 F.2d 1235, 1240 (11th Cir. 1989) (Quoting *Migra v. Warren City School District Board of Education*, 465 U.S. 75, 77 n.1 (1984)).

For res judicata to bar a subsequent suit, four elements must be present:

> (1) a final judgment on the merits rendered in the previous suit; (2) the judgment was rendered by a court of competent jurisdiction; (3) the parties, or those in privity with them, are identical in both cases; and (4) the same cause of action is involved in both cases.

Id. "If all of these elements are met, any claim that was *or could have been adjudicated* in the previous action is precluded." *N.A.A.C.P. v. Hunt*, 891 F.2d. 1555, 1560 (11th Cir. 1990) (emphasis added). For purposes of res judicata, "[t]he dismissal for failure to state a claim under Federal Rule of Civil procedure 12(b)(6) is a 'judgment on the merits.'" *Federated Department Stores, v. Moitie*, 452 U.S. 394, 399 n. 3 (1981). If a claim is litigated by a individual, filing a subsequent suit as a class action will not prevent the application of res judicata. "A person who appears in his own behalf in litigation has had his day in court and is bound by the judgment. Just as he may not himself relitigate the claim thus decided, neither may he do so in a subsequent action prosecuted or defended through a representative." *E.E.O.C. v. United States Steel Corp.*, 921 F.2d 489, 493 (3rd Cir. 1990) (quoting *Restatement (second) of Judgments*, §42(2) comment g (1980)). *See also, E.E.O.C. v. Huttig Sash & Door Co.*, 511 F.2d 453, 455 (5th Cir. 1975) (where an individual brings suit following the filing of an EEO complaint, the EEOC may sue to end practices discovered through investigating the individual charge but is "barred from filing suit on that particular charge and on behalf of that person who had his suit adjudicated. Res judicata would prevent such a suit.") Finally, "if a case arises out of the

same *nucleus of operative fact*, or is based upon the same factual predicate, as a former action, ... the two cases are really the same "claim" or "cause of action for purposes of res judicata." *Citibank, N.A. v. Data Lease Financial Corp.*, 904 F.2d 1498, 1503 (11th Cir. 1990). *See also, Thomas v. Evans*, 880 F.2d at 1240.

In the captioned case, plaintiff's prior suit against HSS and against Coleman and Dunst meet all four criteria. They were both dismissed under Rule 12(b)(6) and thus were adjudicated on the merits. They were decided by the United States District Court for the Northern District of Georgia and the Eleventh Circuit Court of Appeals held that jurisdiction was proper based on 28 U.S.C. §1331. Thus the prior cases were decided by a court of competent jurisdiction. Although this suit is filed as a class action and the prior suits were individual suits, both plaintiff and HHS were parties to the first of the prior suits, and , thus, to the extent that plaintiff is involved in the captioned case, the parties were identical. Plaintiff's second prior suit was a *Bivens* action filed against Terry Coleman, Principal Deputy General Counsel, OGC HHS and Isabel Dunst, Deputy General Counsel, OGC, HHS. Coleman and Dunst are privity with HHS and thus the parties in plaintiff's second prior suit are also identical with those in the captioned case. Finally, both the captioned case and the prior suits arose from plaintiff's allegations that his grievance was wrongfully denied because of his having also filed a discrimination complaint. The captioned case arose from the same nucleus of operative facts as the prior suits and thus involves the same cause of action as the prior suits. The captioned case is therefore barred by res judicata.

CONCLUSION

For the reasons stated above, defendant's motion for summary judgment is granted [5-1]. Plaintiff's motion for class certification is denied as moot [8-1].

IT IS SO ORDERED this 19th day of March, 1993

WILLIAM C. O'KELLY
Chief United States District Judge

APPENDIX C

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Office of Review and Appeals
5203 Leesburg Pike, Suite 900
Falls Church, Virginia 22041

James N. Stephens,	:	
Appellant,	:	
	:	
v.	:	Appeal No. 01880531
	:	Agency No. OSH-68-87
Department of	:	
Health and Human Services,	:	
Agency.	:	

DECISION

Appellant filed an appeal with this Commission from a final decision of the agency concerning his complaint of unlawful employment discrimination, in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e *et seq.*, and the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 *et seq.* The agency decision was received by appellant on November 2, 1987. The appeal was postmarked on November 20, 1987. Accordingly, the appeal is timely (*see* 29 C.F.R. §1613.233(a)), and is accepted in accordance with EEOC Order No. 960, as amended.

The issue on appeal is whether the agency properly rejected appellant's complaint on the grounds that the

rejected allegations state the same claim(s) contained in a previous complaint filed by appellant.

EEOC Regulation 29 C.F.R. §1613.215(a)(1) authorizes the agency head or his designee to reject or cancel a complaint that states the same claim(s) that is pending or has been decided by the agency.

A review of the record reveals that appellant alleges discrimination based on age and reprisal when his grievance was canceled by the agency.

The procedural history of the case is a follows. On or about January 15, 1987 appellant learned that he was not selected for the position of Chief Counsel. On February 11, 1987 appellant filed a grievance with the agency concerning his non-selection for the position of Chief Counsel. On July, 17, 1987 appellant filed his discrimination complaint, No. OSH-94-86, not in the appellate record, which, based on correspondence of the parties, appears to allege employment discrimination based on his non-selection for Chief Counsel. This complaint was accepted and is pending with the agency. On August 4, 1987 the agency canceled the February 11, 1987 grievance because it concerned the same matter of non-selection for chief counsel as the July 17, 1987 discrimination complaint. On November 21, 1987 appellant filed his second EEO complaint (OSH-68-87) alleging that his grievance was cancelled as reprisal for his having filed his first EEO complaint. Appellant now appeals the rejection of his second complaint (OSH-68-87) which according to the agency raises the identical matter or claim of his non-selection for Chief Counsel.

The agency failed to submit any evidence of appellant's first complaint, No. OSH-94-86. As a result the Commission is not able to compare the two complaints to determine if they raise the identical matter or state the same claim concerning appellant's non-selection for Chief Counsel. Accordingly, the agency's decision to reject appellant's complaint as stating the same claim as that raised in a previous complaint filed by appellant was improper and is VACATED due to insufficient evidence. The following may assist the parties in further clarifying this matter. If the facts stated above are correct and the agency is subject to 5 U.S.C. §7121(d), while appellant is covered by a collective bargaining agreement that provides for allegations of discrimination to be raised in the negotiated grievance procedure, then it appears appellant elected the grievance procedure as the forum for resolving his non-selection as Chief Counsel by filing the grievance before the EEO complaint. 29 C.F.R. §1613.219. In this event, the agency need not submit appellant's complaint (OSH-94-86), for comparison because the entire matter, including the allegations of discrimination, should be processed in the grievance procedure. If 29 C.F.R. §1613.219 is not applicable to the facts of this case, i.e., appellant is not covered by a collective bargaining agreement permitting him to raise allegations of discrimination in the grievance procedure, then acceptance of the first EEO complaint, No. OSH-94-86 and processing under 29 C.F.R. §1613.201 *et seq.* was correct. However, in the latter situation, dismissal of the earlier grievance for addressing the same matter as the subsequently filed EEO complaint would be inappropriate. The complaint is REMANDED to the agency for further clarification regarding election under 29 C.F.R. §1613.219 and or processing in accordance with this decision and applicable regulations.

IMPLEMENTATION OF THE COMMISSION DECISION

Compliance with the Commission's corrective action is mandatory. The agency must report to the Commission, within sixty (60) calendar days of receipt of the decision, that corrective action has been taken. The agency's report should be sent to the Director of Compliance, Office of Review and Appeals, Equal Employment Opportunity Commission, 5203 Leesburg Pike, Suite 900, Falls Church, Virginia 22041. A copy of the report should be sent to the appellant.

A Statement of Appellant's Rights (R-1) is attached to the Decision.

FOR THE COMMISSION:

DATE: March 28, 1988

Dolores L. Rozzi, Director
Office of Review and
Appeals

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Office of Review and Appeals
5203 Leesburg Pike, Suite 900
Falls Church, Virginia 22041

Rev. 11-30-87
R-1

NOTICE OF RIGHT TO REQUEST REOPENING

The attached decision is final unless a timely request to reopen is filed.

The Commissioners may, in their discretion, reopen and reconsider the decision in this case if the requesting party submits a request containing arguments or evidence which tend to establish that:

1. New and material evidence is available that was not readily available when the previous decision was issued; or

2. The previous decision involved an erroneous interpretation of law or regulation or misapplication or established policy; or

3. The decision is of such exceptional nature as to have effects beyond the actual case at hand.

Requests and supporting arguments *MUST* be submitted to the Commission and the opposing party within the 30-day time frame for filing a request to reopen. A cross request to reopen or any argument in opposition to the request to reopen, *MUST* be submitted to the Commission and the opposing party within 20 days of receipt of the request to reopen. *See*, 29 C.F.R.

Sec. 1613.235 (see copy on reverse page). All request and arguments must bear proof of post mark and be submitted toe the Director, Office of Review and Appeals, Equal Employment Opportunity Commission, 5203 Leesburg Pike, Suite 900, Falls Church, Virginia 22041. In the absence of a postmark, the request to reopen shall be deemed filed on the date it is received by the Commission.

NOTICE OF APPELLANT'S RIGHT TO FILE A CIVIL ACTION

You have the right to file a civil action in an appropriate United States District Court *WITHIN THIRTY (30) DAYS* of the date that you receive this decision, unless within that time you decide to file a request to reopen. As to any claim based on the Age Discrimination in Employment Act of 1967 (29 U.S.C. Sec. 633a), you MAY have up to six years after the right of action first accrued in which to file a civil action. *See Lehman v. Nakshian*, 453 U.S. 156 (1981); 29 U.S.C. Sec. 633a(f); and 28 U.S.C. Sec. 2401(a). If you file a civil action, *YOU MUST NAME THE APPROPRIATE OFFICIAL HEAD OR DEPARTMENT HEAD AS THE DEFENDANT.* You must describe the defendant by official title rather than by name. Failure to provide the *NAME OR OFFICIAL TITLE* of the agency head or, where appropriate, department head, may result in the dismissal of your case. Department means the national organization, for example, Department of Health, Education and Welfare (that agency no longer exists) and *not* the local administrative department where you might work. Fed. R. Civ. P. 25(d)(2).

APPOINTMENT OF COUNSEL

If you decide to file a civil action and do not have or cannot afford the services of an attorney, under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Sec. 2000e *et seq.*, and the Rehabilitation Act of 1973, as amended, 29 U.S.C. Sec. 791 and Sec. 794c, as amended, you may request that the Court appoint an attorney to represent you and that the Court permit you to file the civil action without payment of fees, costs, or security. Your request must be *FILED WITH THE COURT WITHIN THIRTY (30) DAYS* form the date that you receive the Commission's decision.

Dolores L. Rozzi, Director
Office of Review and
Appeals

29 CFR 1613.235 Reopening and reconsideration.

(a) The Commission may, in its discretion, reopen and reconsider any decision of the Commission notwithstanding any other provisions of this part.

(b) Parties may request reopening or reconsideration provided that such request is made within 30 days of receipt of a decision issued pursuant to 1613.234 or within 20 days of receipt of another party's timely request to reopen. Such requests shall be submitted to the Office of Review and Appeals. the request shall contain arguments or evidence which tend to establish that:

(1) New and material evidence is available that was not readily available when the previous decision was issued; or

(2) The previous decision involved an erroneous interpretation of law or regulation or misapplication of established policy; or

(3) The decision is of such exceptional nature as to have effects beyond the actual case at hand.

(c) (1) The party requesting reopening or reconsideration shall submit copies of the request and supporting documents to all other parties and their representatives at the time of the request along with proof of such submission.

(2) Any argument in opposition to the request to reopen or cross request to reopen shall be submitted to the Office of Review and Appeals and to the requesting party within 20 days of receipt of the request to reopen along with proof of such submission.

(d) A decision on a request to reopen by either party is final and there is no further right by either party to request reopening.

APPENDIX D

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Office of Review and Appeals
P.O. Box 19848
Washington, D.C. 20036

James N. Stephens,	:	
Appellant,	:	
v.	:	Appeal No. 01892997
Dr. Louis W. Sullivan,	:	Agency No. OSH-055-89
Secretary,	:	
Department of	:	
Health & Human Services,	:	
Agency.	:	

DECISION

Appellant filed an appeal with this Commission from a final decision of the agency concerning his complaint of unlawful employment discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e *et seq*. The agency decision was received by appellant on May 31, 1989. The appeal was postmarked June 16, 1989. Accordingly, the appeal is timely (*see*, 29 C.F.R. § 1613.233(a)) and is accepted in accordance with EEOC Order No. 960, as amended.

ISSUE PRESENTED

The issue on appeal is whether the agency properly rejected appellant's complaint on the grounds that the rejected allegation states the same claim contained in a previous complaint filed by appellant.

BACKGROUND

Appellant filed an EEO complaint, Agency No. OSH-303-88, concerning his nonselection for either of two positions, that of Deputy Chief Counsel for Health, Human Resources and Administrative Law and that of Deputy Chief Counsel for Social Security Programs and Litigation (the "Deputy Counsel" positions). Appellant was nonselected for the Deputy Counsel positions on December 7, 1987. His formal EEO complaint, alleging discrimination on the bases of age and reprisal for prior complaints, was filed on April 22, 1988 and accepted for processing by the agency on April 27, 1988, and accepted for processing by the agency on April 27, 1988.[1]

On December 24, 1987, or prior to the filing of his formal EEO complaint, appellant filed a Stage 1 grievance which raised the previous abolishment of appellant's position of Deputy Chief Counsel and the resulting creation of the Deputy Counsel positions. Appellant's grievance alleged that: (a) the selections for the Deputy Counsel positions violated the applicable merit promotion plan in that improper selective factors were used; (b) the agency violated the provisions of 5 C.F.R. §300.103 by failing to develop knowledge, skills and abilities ("KSA") for Deputy Counsel positions and, if a KSA was developed, it bore no rational relationship to the Deputy Counsel positions; (c) even if the merit promotion plan was inapplicable, the selections violated

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[1] Other EEO complaints pending before the agency include appellant's complaint regarding his 1985 nonselection for the position of Regional Attorney (Agency No. OSH-94-86) and his May 1987 nonselection for the position of Chief Counsel (Agency No. OSH-395-87).

agency policy that "particular attention should be paid to the supervisory skill of each candidate" since appellant was nonselected despite his more extensive supervisory experience; and (d) the agency did not comply with an agency policy regarding the opportunity to offer individual or group recommendations and to suggest candidates. Thus, appellant's grievance did not raise allegations of discrimination or reprisal.

In its Stage 1 decision, the agency stated that any grievance regarding the prior abolishment of the position of Deputy Chief Counsel was rejected on the grounds of timeliness. The agency further found that appellant was not entitled to grieve his nonselection *per se* for the Deputy Counsel positions. (While the grievance procedures provided by 5 C.F.R. §777.201 *et seq* " cover all nonbargaining unit employees of the agency" (5 C.F.R. §777.204(a)), they do not include matters concerning "[n]onselection for promotion from a group of properly ranked and certified candidates" (5 C.F.R. §777.206 (c) (iii)). However, the agency found that, pursuant to the provisions of 5 C.F.R. §300.104(c) (2), appellant was entitled to file a grievance alleging that the selection criteria utilized by the agency did not conform to the provisions of 5 C.F.R. §300.103, which requires that the employment practices (such as selection decisions) utilized by federal agencies be based on the duties and responsibilities of a position and the KSA needed to perform a position, and that there be a rational relationship between performance in the position and the employment practice. However, the Stage 1

decision found that the agency's actions were in conformance with the provisions of 5 C.F.R. §300.103.

Appellant pursued his grievance to Stage 2. At Stage 2, appellant apparently abandoned any pursuit of allegations concerning the abolishment of the Deputy Chief Counsel position or his nonselection for the Deputy Counsel positions *per se*, stating that the grievance was "presented pursuant to 5 C.F.R. [§]300.104(c)(2) on the ground that employment practices were used in the selection process which violated 5 C.F.R. [§]300.103." The Commission notes here that while 5 C.F.R. §300.103(c) provides that an agency's employment practices shall not discriminate on the basis of race, color, religion, sex, age, or national origin, appellant did not allege that the employment practices utilized by the agency in the selection process were discriminatory. Rather, his arguments only addressed his prior assertion that the employment practices violated 5 C.F.R. §300.103(a) and (b) in that they were not based on the duties and responsibilities of the Deputy Counsel positions and the KSA needed to perform them, and that there was no rational relationship between performance in the position and the employment practice. In a lengthy decision, the agency denied the grievance pursuant to an analysis which found that the selection procedures had satisfied the provisions of 5 C.F.R. §300.103(a) and (b) and complied with the agency's internal policies. Although the decision stated that it was the "final determination" of the agency and "exhausts the administrative" process, it also stated that appellant could file a request for reconsideration of the

decision, but that a "formal grievance decision will not normally be reconsidered except upon a reasonable showing that the decision is in clear, specific and substantive violation of law, or is clearly arbitrary and capricious."

Appellant filed a request for reconsideration. By letter dated June 24, 1988, the request was denied by the agency's Director, Office of Human Relations. The denial found that appellant had not met the standards for reconsideration in that he did not adequately identify the employment practices which allegedly violated 5 C.F.R. §300.103, explain how they were used to his detriment or establish a nexus between the alleged employment practices and the regulation. The denial further stated that appellant's grievance raised "the identical matter raised in his EEO complaint" and that complaints of discrimination were excluded from grievance review by 5 C.F.R. §771.206(c)(ii) and/or that agency regulations required rejection of grievances concerning matters about which the employee has filed a formal EEO complaint.

On August 8, 1988, appellant contacted an EEO Counselor and in October 1988 filed a formal EEO complaint alleging that his grievance reconsideration request had been denied in retaliation for his prior EEO complaints. In a final decision dated December 15, 1988, the agency rejected appellant's EEO complaint on the basis that appellant's complaint stated the same claim as that raised in his prior April 1988 EEO complaint concerning his nonselection for the Deputy Counsel

positions. Appellant timely appealed. Because the record lacked certain necessary information, the Commission vacated the final agency decision and ordered issuance of a new final decision supported by relevant documents. *See* EEOC Appeal No. 01891176 (April 12, 1989).

Thereafter, on May 25, 1989, the agency issued a new final agency decision which again found that appellant's April 1988 and October 1988 complaints stated the same claim. Appellant timely appeals. In his appeal, appellant argues that his *grievance* does not state the same claim as his April 1988 complaint in that the "grievance dwells entirely on selection process defects and makes no mention of discrimination." Appellant notes that he could establish a defect in the selection criteria without establishing discrimination and could likewise establish that he had been subjected to discrimination without establishing a defect in the selection criteria. Appellant further notes that he had filed a EEO complaint and a grievance concerning a prior nonselection and then, as here, filed an EEO complaint alleging that the agency had discriminatorily denied reconsideration of its adverse grievance decision. Although the agency had rejected his EEO complaint on the grievance reconsideration as identical to his EEO complaint on the nonselection itself, the Commission found that "the grievance was not cancellable under the agency's regulatory authority because it did not relate to the age discrimination claim" and, therefore, "the issue" in the two EEO complaints was "different". EEOC Request No. 05881055 (June 9, 1989) reversing EEOC Appeal No. 01882821 (August 22, 1988).

The agency has not filed comments on the appeal.

ANALYSIS AND FINDINGS

The Commission first notes that the agency found that appellant could not file a grievance concerning his nonselection *per se* for the Deputy Counsel positions, but could only grieve the question of whether the selection criteria utilized conformed to the provisions of 5 C.F.R. §300.103. Appellant and his counsel concurred in this finding, raising only this question at Stage 2 of the grievance. Therefore, for purposes of the Commission's Regulations, appellant's April 1988 EEO rejection on the basis that it constituted an EEO "complaint[] filed after a grievance has been filed on the same matter." 29 C.F.R. §1613.219(b). However, the agency did *not* reject appellant's April 1988 EEO complaint on the basis of his prior filing of the grievance in December 1987. Rather, in denying appellant's request for reconsideration of its adverse grievance decision, the agency found that not only had appellant not met the criteria for reconsideration, but that his grievance should have been rejected as concerning a matter about which appellant had filed an EEO complaint.

While appellant may well have persuaded the Commission that his grievance and his April 1988 EEO complaint do not state the same claim, particularly since the Commission has no authority *per se* to determine whether the selection criteria utilized conformed to the

provisions of 5C.F.R. §300.13[2], the Commission is not empowered to determine whether or not a *grievance* is subject to rejection. The Commission may only determine whether an *EEO Complaint* is subject to rejection. Thus, EEOC Request No. 05881055 is in error insofar as it found that a "grievance was not cancelable under the agency's regulatory authority."

The question before the Commission concerns only the propriety of the agency's rejection of appellant's October 1988 EEO complaint alleging that the agency discriminatorily refused to reconsider its adverse grievance decision. The Commission finds that the April 1988 EEO complaint and the October 1988 EEO complaint do not state the same claim. The April 1988 EEO complaint concerns the motivation of and decisions made by the selecting officials with respect to the Deputy Counsel positions. The October 1988 EEO complaint concerns only the motivation of and decision made by the agency's Director, Office of Human Relations who denied appellant's request for reconsideration of the adverse grievance decision. Similarly, Request No. 05881055 correctly found that appellant's prior EEO complaints were not subject to rejection on the basis that they stated the same claim.

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[2] The Commission only has the authority to decide whether, for example, any agency failure to utilize proper criteria was based on discriminatory considerations. As neither appellant's grievance nor his EEO complaint make such a claim, appellant correctly notes that his success or failure in the grievance process would not necessarily affect a decision on his April 1988 EEO complaint.

However, there is another question which should be addressed by the Commission. The Commission has no power to address the merits of appellant's grievance. As repeatedly noted by appellant, his grievance does not raise any allegations of discrimination. Moreover, appellant's grievance also does not fall within the provisions of 29 C.F.R. § 1613.219(a) in that it is not part of a "a grievance procedure [utilized] by [an] employee[] in [an] agenc[y] subject to the provisions of 5 U.S.C. §7121(d) *and* who [is] covered by a collective bargaining agreement...." Appellant is an exempt employee not covered by a collective bargaining agreement. Consequently, appellant could not appeal any decision on his grievance to the Commission, since a person may only appeal to the Commission a decision of an agency head or designee "on issues of employment discrimination raised in a negotiated grievance procedure covered by §1613.219(a), where the agency's negotiated agreement permits such issues to be raised." 29 C.F.R. §1613.231(b).

In light of the foregoing, *the question has been raised as to whether a complainant may properly pursue an EEO complaint challenging a grievance decision made outside the confines of 29 C.F.R. §1613.219(a).* Because such an EEO complaint nonetheless concerns the actions of an agency official and is made by an "aggrieved employee... who believes that he... has been discriminated against by that agency", *the Commission has previously held that such a complaint states a claim within the Commission's jurisdiction.* 29 C.F.R. §1613.212(a). *See* EEOC Request No. 05890272 (July 27, 1989). However, such a complaint may not be used as a vehicle for circumventing the limitations on the Commission's power to review grievance

decisions rendered outside the confines of 29 C.F.R. §1613.219(a). The Commission may not consider whether or not the final grievance decision properly determined that the selection criteria utilized violated 5 C.F.R. §300.103. The Commission will only consider whether appellant prevailed in establishing by a preponderance of the evidence that the Director, Office of Human Relations denied his request for reconsideration of the adverse grievance decision in retaliation for appellant's prior EEO activity. Should appellant prevail, the relief awarded will not be that requested in appellant's instant October 1988 EEO complaint, i.e., appointment to a Deputy Counsel position with a backpay. The only relief available is an order that appellant's request for reconsideration of his adverse grievance decision be reheard by an unbiased agency official. *See, c.f., Smith v. Horner*, 46 F.E.P. Cases 1523 (D.C. Cir. 1988). While this decision concerns only whether the agency properly rejected appellant's October 1988 complaint and not the merits of the complaint, the Commission notes that even if it is assumed that the agency retaliated against appellant because it cited his April 1988 EEO complaint in its denial of his grievance reconsideration request, the agency can prevail in the instant October 1988 EEO complaint by establishing a preponderance of the evidence that it would have denied the grievance reconsideration request even absent such retaliatory motivation. *See, Price Waterhouse v. Hopkins*, _____U.S. _____, 49 F.E.P. Cases 954 (1989).

ORDER

Accordingly, the agency's decision is VACATED and the complaint is hereby REMANDED for processing in accordance with the Order below:

The agency shall accept, investigate and process the complaint pursuant to 29 C.F.R. §§1613.215-.222. The agency shall notify the Commission and the appellant no later than thirty (30) calendar days from the date this decision becomes final that it has accepted the complaint and indicate the name and telephone number of the investiator to whom it has been assigned. The investigation shall be completed and a proposed disposition issued within 150 calendar days of the date this decision becomes final, unless the matter is otherwise resolved within that timeframe. A copy of the relevant document finalizing the complaint must be sent to the Compliance Officer as referenced below.

IMPLEMENTATION OF THE COMMISSION DECISION

This decision will become final within thirty (30) calendar days of the date the agency receives it, unless the agency files a request for reconsideration within the thirty (30)-day period. *See* 29 C.F.R. §1613.237(b), (c) (1988).

Compliance with the Commission's corrective action is mandatory. The agency shall report (1) implementation of the corrective action within thirty(30) calendar days of the date the decision becomes final and (2) the final disposition of this complaint within 150 calendar days of the date this decision becomes final by

writing the Compliance Officer, Office of Review and Appeals, Equal Employment Opportunity Commission, P.O. Box 19848, Washington, D.C. 20036. The agency's report must contain supporting documentation, and it must send a copy of all submissions to the appellant.

STATEMENT OF RIGHTS — ON APPEAL
RIGHT TO REQUEST REOPENING

This decision is final unless a timely request to reopen is filed.

The Commissioners may, in their discretion, reopen and reconsider the decision in this case if you or the agency submits a written request and argument which tend to establish that:

1. New and material evidence is available that was not readily available when the previous decision was issued; or

2. The previous decision involves an erroneous interpretation of law or regulation or misapplication of established policy; or

3. The previous decision is of a precedential nature involving a new or unreviewed policy consideration that may have effects beyond the actual case at hand or is otherwise of such an exceptional nature as to merit the personal attention of the Commissioners.

Requests and supporting arguments *MUST* be submitted to the Commission and the opposing party within the 30-day time frame for filing a request to reopen. A cross request to reopen, or any argument in

opposition to the request to reopen, *MUST* be submitted to the Commission and the opposing party within 20 days of receipt of the request to reopen. *See* 29 C.F.R. §1613.235. All requests and arguments must bear proof of postmark and be submitted to the Director, Office of Review and Appeals, Equal Employment Opportunity Commission, P.O. Box 19848, Washington, D.C. 20036. In the absence of a postmark, the request to reopen shall be deemed filed on the date it is received by the Commission.

RIGHT TO FILE A CIVIL ACTION

You have the right to file a civil action in an appropriate United States District Court *WITHIN THIRTY (30 DAYS)* of the date that you receive this decision, unless within that time you decide to file a request to reopen. As to any claim based on the Age Discrimination in Employment Act of 1967 (29 U.S.C. §633a), you *MAY* have up to six years after the right of action first accrued. *See Lehman v. Nakshian*, 453 U.S. 156 (1981); 29 U.S.C. §633a(f); and 28 U.S.C. §2401(a). If you file a civil action, *YOU MUST NAME THE PERSON WHO IS THE OFFICIAL AGENCY HEAD OR DEPARTMENT HEAD AS THE DEFENDANT. Agency or department means the national organization, and not the local office, facility or department in which you might work. DO NOT NAME JUST THE AGENCY OR DEPARTMENT.* You must also state the official title of the agency head or department head. Failure to provide the *NAME OR OFFICIAL TITLE* of the agency head or department head may result in the dismissal of your case.

RIGHT TO COUNSEL

If you decide to file a civil action, and if you do not have or cannot afford the services of an attorney, you may request that the Court appoint an attorney to represent you and that the Court permit you to file the civil action without payment of fees, costs or security. *See* Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*, as amended; the Rehabilitation Act of 1973, 29 U.S.C. §§791, 794(c), as amended. Filing a request for an attorney does not extend your time in which to file a civil action. Both the request and the civil action *MUST BE FILED WITHIN THIRTY (30) DAYS* from the date you receive the Commission's decision.

FOR THE COMMISSION;

February 5, 1990

Dolores L. Rozzi, Director
Office of Review and
Appeals

APPENDIX E

DEPARTMENT OF HEALTH & HUMAN SERVICES
Office of the Secretary
Washington, D.C. 20201

Certified Mail – Return Receipt Requested

Ms. Beverly B. Bates, Esq.
Suite 3500
101 Marietta Tower
Atlanta, GA 30303

Re: Class Complaint of Discrimination
James Stephens, Class Agent
EEOC No. 110-91-8138X

Dear Ms. Bates:

This is to inform you of the Department's decision to reject the class complaint of discrimination, filed by James N. Stephens, Class Agent, against the Office of the Secretary, Department of Health and Human Services. Mr. Stephens filed his class complaint on June 13, 1991.

Mr. Stephens filed the complaint for employees of the Department of Health and Human Services. He alleged discrimination based on retaliation, when the agency rejected "all grievances in which the grievant has filed a discrimination complaint arising out of the same personnel action."

The complaint was forwarded to the Equal Employment Opportunity Commission (Commission) by letter, dated July 8, 1991. The matter was assigned to

Administrative Judge (AJ) Calvin Washington. The Commission submitted the AJ's report and recommendation by letter dated March 30, 1992. The AJ recommended rejection of the complaint by the Department for processing as a class complaint of discrimination for the following reasons:

1. The AJ found that the class complaint is not within the purview of Title 29 C.F.R. §1613.601 *et seq*. The AJ points out that only the basis of race, color, religion, sex, national origin, age or handicapping condition are within the purview of Subpart F. Reprisal and retaliation, the sole basis of this complaint, are not included under Subpart F.

2. The AJ found that this complaint is untimely. The complainant's departmental grievances were canceled or rejected on February 26, 1986; August 4, 1987; September 16, 1987; and June 24, 1988. The complainant did not contact an EEO Counselor until May 7, 1991, almost three years after the most recent alleged occurrence.

3. The AJ found that numerosity has not been shown. The complainant has stated that the number of employees of the Department affected by the alleged policy of rejecting EEO related grievances is too large to estimate. The AJ contends that without more definitive information, the numerosity requirement has not been met.

After careful consideration, I adopt the Administrative Judge's report and recommendation as my decision on this class complaint. I enclose a copy of the report for reference.

DECISION

I reject the class complaint of James N. Stephens, because it is not within the purview of Title 29 C.F.R. § 1613.601.

This rejection of Mr. Stephens class complaint is issued without prejudice to his rights of appeal described below. This rejection is issued with prejudice to his filing of an individual allegation of discrimination.

It is noted that the issue of which Mr. Stephens is complaining concerns Departmental grievances that were canceled or rejected on February 26, 1986; August 4, 1987; September 16, 1987; and June 24, 1988. The EEO Counselor's Report shows that he first sought counseling on May 7, 1991. This is beyond the 30 calendar days stated in Title 29 C.F.R. §1613,214(a)(l)(i). Under the circumstances any allegation of individual discrimination by Mr. Stephens is hereby rejected as untimely filed.

NOTICE OF APPEAL RIGHTS

If the complainant is dissatisfied with this decision, he may submit a written notice of appeal, in duplicate, to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 19848, Washington, D.C. 20036, and in accordance with 29 CFR Section 1613.233, which states, in pertinent part, the following:

> (a) Except as provided in paragraph (c) of this section, a complainant may file a notice of appeal at anytime up to 20 calendar days after receipt of the agency's

> notice of final decision on his or her complaint. Any statement or brief in support of the appeal must be submitted to the Commission and to the defendant agency within thirty (30) calendar days of filing the notice of appeal.
>
> .....
>
> (c) The 20-day time limit within which a notice of appeal must be filed will not be extended by the Commission unless, based on a written showing by the complainant that he or she was not notified of the prescribed time limit and was not otherwise aware of it or that circumstances beyond his or her control prevented the filing of a notice of appeal within the prescribed time limit, the Commission exercised its discretion to extend the time limit and accept the appeal.

He has the alternative of seeking judicial relief by filing a civil action in an appropriate U.S. District Court within thirty (30) calendar days after receipt of this notice of final decision. Please note: If he files a notice of appeal with the Commission, the right to file a civil action will be preserved. In that case, he may file a civil action within thirty (30) calendar days after receipt of the Commission's decision; or, if the Commission has not issued its decision, 180 calendar days after the date the Office of Federal Operations accepted the appeal.

If he elects to file a civil action, he must name as the defendant, the Honorable Louis W. Sullivan, Secretary of the Department of Health and Human Services.

Failure to name the Secretary may result in the loss of any judicial redress to which he may be entitled. He is further advised that he may appeal to a U.S. District Court for appointment of an attorney to represent him in any court proceeding relating to this decision. The court may appoint an attorney to represent him in any court proceeding relating to this decision. The court may appoint an attorney to represent him and may permit commencement of a court action without payment of fees, costs, or security.

FOR THE DEPARTMENT:

Sincerely yours,

Thomas S. McFee
Director
Equal Employment
Opportunity

Enclosure
CC: James N. Stephens, Complainant
Barbara B. Aulenbach, OS
Timothy White, OGC

UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
ATLANTA DISTRICT OFFICE

STATEMENT OF FINDINGS AND RECOMMENDED DECISION TO REJECT THE CLASS DISCRIMINATION COMPLAINT OF JAMES N. STEPHENS

EEOC Case Number:	110-91-8138X
Class Agent:	James N. Stephens
Class Representative:	Beverly Bates
Agency:	Department of Health and Human Services
Complaint:	Discrimination because of retaliation
Administrative Judge:	Mr. Calvin Washington Equal Employment Opportunity Commission Atlanta District Office, Hearings Unit 75 Piedmont Avenue, NE, Atlanta, Georgia 30335
Date of Hearing:	

I. Introduction and Background:

On July 11, 1991, the Equal Employment Opportunity Commission, Atlanta District Office received a class complaint from the United States Department of Health and Human Services, Washington, D.C.. The complaint was filed by James N. Stephens who is employed with the Department of Health and Human Services as a GM-905-14 attorney. The complainant alleges that he and others have been subjected to retaliation for filing EEO complaints. He states that "the agency has a practice of rejecting all grievances in which the grievant has filed a discrimination complaint arising out of the same personnel action." Therefore, complainant says that he was penalized for filing EEO complaints, and that such action amounts to retaliation for filing EEO complaints. He says that on four different occasions he has had grievances rejected because the matter was being pursued under the EEO process.

The complainant says his "requests for reconsideration of the rejections were denied by an agency official Paul C. Johnson, III, on the basis that I had filed a discrimination complaint. Based on the statements of Paul C. Johnson, III, and John S. Bowers in the investigation of OSH 68-87 and OSH 55-89, the same rejections were issued to other grievants who filed discrimination complaints." He says "the statement by agency officials that their handling of the rejections in all cases was consistent leads inevitably to the conclusion that all requests for reconsideration were denied in which individual grievants had filed discrimination complaints." Therefore, the complainant requests that this complaint be processed as a class action complaint.

The complainant contacted an EEO Counselor on May 7, 1991. The EEO Counselor made efforts to resolve the complaint, but all efforts failed. As a result, on May 31, 1991, the Counselor issued a Notice of Final Interview. On July 11, 1991, the EEOC received the subject complaint.

By letter dated June 13, 1991, Counsel for the complainant forwarded a class complaint to the agency. The EEOC received the class complaint on July 11, 1991.

II. Issue:

Whether the instant complaint satisfied the requirement of 29 C.F.R. Section 1613.604(b), which specifies that the Administrative Judge must review the complaint to determine whether it should be rejected for any of the following reasons:

1. It was not timely filed;

2. It consists of an allegation identical to an allegation contained in a previous complaint filed on behalf of the class which is pending in the agency or which has been resolved or decided by the agency;

3. It is not within the purview of subpart (F) of 29 C.F.R. Section 1613;

4. The agent (complainant) failed to consult a Counselor in a timely manner;

5. It lacks specificity and detail;

6. It was not submitted in writing or was not signed by the agent;

7. It does not meet the following pre-requisites:

   (i) The class is so numerous that a consolidated complaint of the members of the class is impractical;

   (ii) There are questions of fact common to the class;

   (iii) The claims of the agent are typical of the claims of the class;

   (iv) The agent of the class, or his/her representative, will fairly and adequately protect the interests of the class.

III. Applicable Law

The Supreme Court has repeatedly held that employment discrimination class actions by private individuals must conform to the requirements of F.R.Civ. P.23 (29 C.F.R. Section 1614.604 (b)(7) I-IV). *General Telephone Co,. of Southwest v. Falcon*, 457 U.S. 147 (1982); *East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977). In *Falcon*, the Court said:

> Title VII, however, contains no special authorization for class suits maintained by private parties. An individual litigant seeking to maintain a class action under

> Title VII must meet 'the prerequisites of numerosity, commonality, typicality, and adequacy of representation' specified in Rule 23(a). *Id.*, at 330. These requirements effectively 'limit the class claims to those fairly encompassed by the named plaintiff's claims.' *Id.*
>
> We have repeatedly held that 'a class representative must be part of the class and possess the same interest and suffer the same injury as the class members.' *East Texas Motor Freight System, Inc. v. Rodriguez*, (14 EPD 7578) 431 U.S. 395, 403 (quoting *Schlesinger v. Reservist Committee to Stop the War*, 418 U.S. 208, 216).

The Court went on to emphasize that the burden is on the complainant to make a showing that the class action requirements are met by stating that: "Without any specific presentation identifying the questions of law or fact that were common to the claims..., it was error for the district court to presume that respondent's claim was typical of other claims...."

The Eleventh Circuit Court of Appeals has said: "complaining federal employees [must] reasonably and in good faith compl[y] with the [Commission's] regulatory requirements . . . ." *Wade v. Secretary of Army*, 796 F. 2d 1369 (11th Cir. 1986). The Court subsequently re-affirmed that:

> A Title VII plaintiff will be held to the prerequisites of numerosity, commonality, typicality and adequacy of representation

specified in Rule 23 (citing *General Telephone Co. v. Falcon*, 457 U.S. 147, 136 (1982)). *Coon v. Georgia Pacific Corp.* 829 F.2d 1563 (11th Cir. 1987).

As a general rule, only attorneys are allowed to represent a class. *See, e.g., Martin v. Middendorf*, 420 F. Supp. 779, 760-1 (D.D.C. 1976). This is because skills are needed in the use of statistics, interrogatories, requests for the production of documents, techniques for questioning witnesses and other areas such as researching the substantive law to be applied. Normally, these skills are not found in individuals who do not have formal legal training. Furthermore, discrimination cases often involve complicated issues with relatively complicated case law which in the interest of the class and the possible *res judicata* effect of a ruling adverse to the class requires a competent and experienced class representative.

Also as a general rule, federal courts are reluctant to certify a class with fewer than forty-five members. *See Baldwin v. Frank*, EEOC ORA No. 0189416 (June 6, 1989). In *Conty v. Brady*, EEOC ORA No. 0191543 (December 1, 1989), ORA held seventeen class members was not sufficiently numerous to certify a class.

IV. Analysis and Conclusion:

I will discuss each of the areas listed under Section II, above, and give my reasons why the class complaint should be rejected.

1. Under 29 C.F.R. Section 1613.602 (c) a complaint *must* be filed not later than 15 days after the agent's receipt of the notice of the right to file a complaint. The EEO Counselor's Notice of Final Interview is dated May 31, 1991, and the complaint was filed with the agency on June 14, 1991. Thus, the complaint was timely because it was filed on the fourteenth day after the EEO Counselor issued the Notice of Final Interview.

2. Neither party indicted whether the complaint consists of an allegation identical to an allegation contained in a previous complaint filed on behalf of the class which is pending in the agency or has been resolved or decided by the agency. Since I have no evidence to the contrary, I must conclude that the complainant has met this requirement.

3. The subject complaint is not within the purview of 29 C.F.R. Section 1613.601 *et seq*. The EEOC's regulations state that "a class is a group of employees, or applicants for employment who, it is alleged, have been, are being, or may be, adversely affected by an agency personnel management policy or practice which discriminates against the group on the basis of their common race, color religion, sex, national origin, age or handicapping condition." Conspicuously absent from this definition is the basis of reprisal or retaliation. The complainant says he and other employees are subjected to retaliation when grievances are

rejected because the grievances raise issues that are being addressed under the EEO complaints process. Ostensibly, the EEOC did not want retaliation to serve as a basis for bringing a class action. Had the Commission desired that such a claim be pursued as a class action, it would have listed retaliation as a basis on which a class action claim could be filed. Additionally, the agency rejected the grievances on the grounds that it was adhering to the requirement imposed by Office of Personnel Management regulations found at 5 C.F.R. Section 771.201 *et seq*. These regulations require that agencies establish an administrative grievance system (5 C.F.R. Section 771.201). The regulations state that such a grievance system must allow employees to grieve "any matter of concern or dissatisfaction relating to the employment of an employee, which is subject to the control of agency management" (5 C.F.R. Section 771.205). However, the OPM regulations state that the regulations pertaining to the administrative grievance system do not apply to matters that are "subject to final administrative review by... the Equal Employment Opportunity Commission under law or regulations" (5 C.F.R. Section 771.206 (c)(1)(ii)). Consequently, the agency followed OPM requirements in rejecting the grievances. The EEOC's regulations were not designed to permit a class action that would challenge the validity of agency and OPM procedural regulations related to the administrative grievance system. Furthermore, even EEOC

regulations provide that a federal employee cannot simultaneously pursue the same claim under a negotiated grievance system and under federal EEO procedures. See 29 C.F.R. Section 1613.219. The employee is required to elect. While the grievances related to the subject complaint were filed under the administrative grievance system, I believe that it is at least helpful to consider that the EEOC's regulations forbid aggrieved individuals from concurrently pursuing a single claim in two separate and distinct forums. The courts have approved of this election requirement by the EEOC. See *Vinieratos v. United States Department of Air Force*, 939 F.2d 762 (9th Cir. 1991). Accordingly, I find that the subject complaint is not within the purview of 29 C.F.R. Section 1613, Subpart F.

4. Under 29 C.F.R. Section 1613.602 an employee who wishes to be an agent and who believes he or she has been discriminated against *shall* consult with an Equal Employment Opportunity Counselor within 30 calendar days of the matter giving rise to the allegation of individual discrimination.

The EEO Counselor's report states that the complainant's departmental grievances were cancelled or rejected on February 26, 1986, August 4, 1987, September 16, 1987 and June 24, 1988. The EEO Counselor's report states that the EEO Counselor was initially contacted on May 7, 1991. The agency actions about which the complainant is complaining occurred years ago. The most recent alleged occurrence took place on June 24, 1988. Given the fact that the relevant events occurred years ago, the complainant's complaint in this case is untimely.

5. The complaint is not lacking in specificity. The complainant has clearly and appropriately described the management practice or policy (i.e. rejection of grievances as being EEO matters) that gives rise to the complaint.

6. The complaint is written and is signed by the agent.

7. (i) Numerosity has not been shown. The record shows that dating from May of 1986 to July of 1990 there were at least five other instances where grievances were rejected. The complainant contends, in effect, that because the agency is large (100,000 employees) and a large number of grievances are filed, the

number of individuals adversely affected by this policy is too large to estimate. Thus, the complainant contends that the numerosity requirement has been meet. I disagree. It is not clear as to how many individuals are impacted by the agency's policy of rejecting EEO related grievances. In the absence of more definitive information, I have to conclude that numerosity has not been shown.

(ii) I find that there are common questions of fact.

(iii) The claims of the agent are typical of the claims of the class.

(iv) The agent and his representative will be able to fairly and adequately protect the interest of the class.

IV. Conclusion:

The complaint does not meet the requirements for acceptance as a class action because (1) the claim is not within the purview of 29 C.F.R. Section 1613.610 *et seq.*; (2) the complaint is untimely and (3) the complainant has not shown the existence of a sufficiently numerous class.

V. Recommended Decision:

I recommend that the complaint be rejected.

NOTICE

Pursuant to *29 Code of Federal Regulations 1613.604 (j)*, the Administrative Judge's recommended decision to accept, reject, or cancel shall become the agency's final decision unless the agency rejects or modifies the recommended decision within thirty (30) calendar days of receipt of the recommended decision and the complete complaint file. The agency shall notify the agent, the agent's Representative and the Administrative Judge of its decision to accept, reject, or modify the recommended decision, and/or cancel the complaint. Notice of the final decision to reject or cancel shall inform the agent of her/his right or proceed with an individual complaint of discrimination, and of the right to appeal the final decision on the matter to the Office of Review and Appeals, Equal Employment Opportunity Commission, 1801 "L" Street, N.W., Washington, D.C. 20507, and of her/his right to file a civil action.

Date: April 1, 1992

Calvin Washington
Administrative Judge

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 93-8507

James N. Stephens,
Individually and as class representative,

Plaintiff-Appellant,

versus

Department of Health and Human Services,

Defendant-Appellee.

On Appeal from the United States District Court for the Northern District of Georgia

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On Petition(s) for rehearing and suggestion(s) of rehearing en banc

Before: Fay and Birch, Circuit Judges, and Tuttle, Senior Circuit Judge.

Per Curiam:

(✓) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the

Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

Entered For the Court:

United States Circuit Judge

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

James N. Stephens,	:	
Individually and as	:	
Class Representative,	:	
Plaintiff	:	
vs.	:	CIVIL ACTION
	:	1:92-cv-1302-WCO:
Secretary, Department of	:	
Health and Human Services,	:	
Defendant	:	

CLASS ACTION COMPLAINT

1. Defendant is the Secretary of the Department of Health and Human Services, and is sued by virtue of that person's official capacity.

2. The class constitutes all employees and former employees of the Department of Health and Human Services (hereafter, "Department"), who are not, or were not when employees, in a bargaining unit. The class extends from the time that the Department policy in issue was initiated until the policy is abandoned.

3. The class is so numerous that joinder of all members is impractical.

4. The Court has jurisdiction under 28 U.S.C. 1331

as the controversy arises under the laws of the United States, most especially 42 U.S.C. 2000 (e) *et seq*.

5. Plaintiff James K. Stephens is an employee of the Department of Health and Human Services who resides in the county of Clayton, state of Georgia, and who is assigned to Region IV of the Department, in Atlanta, Fulton County, Georgia, as Principal Regional Counsel For Retirement & Survivor's Insurance Programs.

6. Plaintiff Stephens is not a member of a bargaining unit.

7. There are questions of law and fact common to the class represented by Plaintiff Stephens.

8. Plaintiff Stephens filed several grievances which challenged selection defects in the advertisement and selection of the Region IV positions of Regional Attorney, Chief Counsel-SES, and Deputy Chief Counsels by Defendant's Office of General Counsel.

9. The grievances were rejected and denied reconsideration on the ground that Plaintiff also filed discrimination complaints arising out of the same personnel action, even though Plaintiff's grievances made no discrimination allegations and were strictly confined to faults and defects in the selection process unrelated to discrimination.

10. The rejection of Plaintiff's grievances for the reason that he had filed discrimination com-

plaints was in turn made by Plaintiff Stephens the subject of discrimination complaints which were denominated OSH-68-67 and OSH-55-89 by the Department.

11. The Department's illegal policy, in its application to all employees who were not members of a bargaining unit, came to Plaintiff Stephen's attention after March 27, 1991, when by letter of this date a report of investigation (ROI) in OSH-68-87 and OSH-55-89 was forwarded to him by the Department.

12. This policy is recited in the affidavit of John S. Bowers given to an investigator on September 21, 1990, and contained in the ROI.

13. The affidavit of Mr. Bowers states that the agency, as a matter of policy, rejected all grievances by all grievants when it was discovered that any discrimination claim by the grievant was pending.

14. Plaintiff Stephens submitted a class petition on the ground that he, as well as others similarly situated, were injured by the agency's illegal policy of refusing to process a grievance if a discrimination complaint was pending which arose out of the same personnel action.

15. On April 22, 1991, within 30 days of being forwarded the ROI containing Mr. Bowers' affidavit, Plaintiff Stephens sought informal counseling for the purpose of initiating a class complaint against the illegal policy.

16. Plaintiff Stephens timely sought counselling, as required by 29 C.F.R. 1613.602, within thirty (30) days of being informed by the agency of this policy.

17. Plaintiff Stephens timely mailed a class petition to the Department on June 13, 1991, and the agency issued a final decision on or about May 1, 1992 rejecting the class petition.

18. A notice was issued to the Plaintiff granting the Plaintiff thirty days from receipt of the notice in which to file an action in the United States District Court if he desired to contest the agency's final decision.

19. Plaintiff received notice on May 5, 1992, and thus this complaint is timely filed.

20. Several thousand grievances are filed annually by non-bargaining unit employees of the Department of Health and Human Services, and many employees, if not the majority, would also file discrimination claims but for the illegal policy of the agency which (1) punishes grievants by rejecting the grievance when a discrimination claim is also filed; and (2) chills grievants from the filing of discrimination claims arising out of the same personnel action when a grievant desires to have a grievance considered.

21. The opportunity for implementing this illegal policy arose because a grievant cannot legitimately include a discrimination claim in a grievance, inasmuch as the administrative processes for a grievance and a discrimination complaint are designed to be mutually independent of each other.

22. The Department erroneously construes itself to be required by 5 C.F.R. 771.201 *et seq.* to reject grievances arising out of the same personnel action as a discrimination claim.

23. The Department, by this policy, violates both the previously cited regulation and its own regulation, HHS 771-3, which if applied correctly avoids punishing grievants and chilling discrimination claims.

24. By this conscious and knowing disregard of its own regulation and flagrant disregard for the rights of its non-bargaining unit employees, the Department has denied the Plaintiff, and all others similarly situated, administrative due process.

Wherefore, the Plaintiff, and all others similarly situated, request that the court determine that this suit may be maintained as a class action by James N. Stephens as the class representative, and award appropriate relief to Plaintiff Stephens and all members of the class, including attorney fees, litigation expenses and costs.

Beverly B. Bates
GA Bar 041800
Attorney for
James N. Stephens,
individually, and as a
Class Representative.

Bates and Baum
3151 Maple Drive, N.E.
Atlanta, GA 30305

(404) 262-6272

APPENDIX H

Equal Employment Opportunity Commission
Atlanta District Office

James N. Stephens,	:	
Complainant,	:	EEOC NOS. 110-92-8015X
	:	110-92-8010X
v.	:	110-92-8009X
	:	110-92-0012X
	:	110-92-0011X
Department of Health	:	AGENCY NOS. OSH-94-86
and Human	:	OSH-395-87
Services, Agency.	:	OSH-303-88
	:	OSH-55-89
	:	OSH-68-87

AGENCY'S MOTION FOR A DECISION WITHOUT A HEARING

Comes now the agency, by and through its undersigned attorney, and pursuant to 29 C.F.R. § 1613.218(g) requests the administrative judge to issue a recommended decision in the above captioned matter without a hearing because there are no genuine issues of material fact.

STATEMENT OF THE CASE

There are several issues that have been investigated by the agency and are before the administrative judge for decision in this case:

Whether, on August 13, 1985, the complainant, James N. Stephens, was the victim of discrimination because of his age when he was not selected for the position of Regional Attorney, action, not because of any

retaliatory animus. (Third ROI, Ex. 5 at 1.) Since the complainant has come forward with nothing to suggest that Mr. Johnson's actions were motivated by retaliatory animus, he has failed to prove his retaliation claim and the administrative judge should recommend that this issue be cancelled.

In summary, the agency has come forward with evidence establishing a legitimate reason for every action about which Mr. Stephens has complained. The officials who made the decisions have denied under oath that they considered or even discussed Mr. Stephens' age or protected activity when they made these decisions. (First ROI, Exs. 5, 6; Second ROI, Exs. 9-13; Third ROI, Exs. 5, 6.)

II. Claims Relating To The Regional Attorney Selection, The February 1986 Grievance Denial, And The Chief Counsel *Selection Are Barred By The Doctrine of Res Judicata.*

Res judicata is a well-established doctrine that promotes economy and consistency by barring all claims that were or could have been raised in an earlier proceeding. *Allen v. McCurry*, 449 U.S. 90, 94 (1980).[4] Four elements must be present to bar an action under this theory: "(1) a final judgment on the merits, (2) rendered by a court of competent jurisdiction, (3) the parties, or those in privy with them, must be identical in both suits, and (4) the same cause of action must be involved in both cases." *Hart v. Yamaha-Parts Distributors*, 787 F.2d 1468, 1471 (11th Cir. 1986).

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[4] EEOC regulations recognize this principle. 29 C.F.R. § 1613.219(b).

On August 26, 1986, Mr. Stephens filed suit against the Secretary of Health and Human Services in the United States District Court for the Northern District of Georgia. *Stephens v. Department of Health and Human Services*, 901 F.2d 1571, 1574 (11th Cir.), *cert. denied*, 111 S.Ct. 555 (1990).[5] In that case, Mr. Stephens challenged the decision not to select him for the regional attorney position, and "also allege[d] the wrongful rejection of a grievance filed by him with HHS to dispute the denial of the promotion." *Stephens v. Secretary, Department of Health and Human Services*, No. 1:88-CV-1875-HTW, slip op. at 1 (N.D. Ga. Apr. 5, 1989) (attached to this motion as Attachment B. ("*Stephens I*")).[6] Both of these decisions are at issue in the case at bar.

As plaintiff, Mr. Stephens made several specific allegations about improprieties in the selection process. Among his charges were that agency officials had "failed to seek comments from plaintiff's past supervisor, improperly considered criteria outside the selection criteria, failed to give appropriate weight to plaintiff's experience, failed to give plaintiff the position of Chief Counsel, Region IV, Atlanta, Georgia." *Id.* at 7.

(*Compare* First ROI, Ex. 4 at 3, 4.) In fact, Mr. Stephens even amended his complaint to add an allegation that he "had been penalized in promotion because he refused to provide derogatory information about his former supervisor." *Stephens*, 901 F.2d at 1574. (*Compare* First ROI, Ex. 4 at 4-5; Second ROI, Ex. 14 at 7-9.)

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[5] A copy of this opinion is submitted with this motion as Attachment A.

[6] Mr. Stephens also took his complaints about these actions to the Office of Special Counsel. *Stephens I*, slip op. at 3.

Approximately one year after filing his first complaint and after the Secretary had filed a motion to dismiss, Mr. Stephens filed another suit in the same court against two HHS employees, Mr. Coleman and Ms. Dunst. *Stephens v. Coleman*, 712 F.Supp. 1571, 1573 (N.D. Ga. 1989) (*"Stephens II"*)[7]. This time he alleged that Mr. Coleman and Ms. Dunst had committed violations of the United States Constitution and various other statutes and rules when they did not appoint him to the Regional Attorney position. Both suits were dismissed because Mr. Stephens had failed to state a claim, and the Eleventh Circuit affirmed the decisions of the district court.

Thus, it is clear that the first prong of the *res judicata* test—final adjudication on the merits — is satisfied. *Federated Dep't Stores v. Moitie*, 452 U.S. 394, 399 n.3 (1981). It is also clear that the United States District Court for the Northern District of Georgia is a court of competent jurisdiction, satisfying the second element. The parties in *Stephens I* are identical to those in this case, and the parties in *Stephens II* are in privy with those in this case. *Mandarino v. Pollard*, 718 F.2d 845, 850 (7th Cir. 1983) (government employees are in privity with their employer for *res judicata* purposes), *cert. denied* 469 U.S. 839 (1984). Thus, the third element is also present.

The fourth element is satisfied "if a case arises out of the same nucleus of operative fact, or is based on the same factual predicate." *Citibank v. Data Lease Financial Corp.*, 904 F.2d 1498, 1503 (11th Cir. 1990). In other words, "parties cannot defeat its application by simply alleging new legal theories." *Clark v. Haas Group*, 953 F.2d 1235, 1238 (10th Cir. 1992).

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[7] A copy of this opinion is submitted with this motion as Attachment C.

In *Clark*, an employee sued her employer in May, 1987, alleging that it had violated the Fair Labor Standards Act, but agreed to dismiss the action in July. The next year, after being terminated from her position, the employee again filed suit, this time charging that the company had violated the Equal Pay Act and the Age Discrimination in Employment Act during the same period of time covered by the earlier action. The Tenth Circuit, reversing the district court, held that the second suit was barred because "[t]he only distinction in the two suits involved the legal theories [the employee] advanced." *Id* at 1239. The appellate court explained that "the two actions were 'related in time, space, origin, or motivation.'" *Id*. The court's explanation continued:

> Furthermore, the 'claims' asserted in the two cases formed 'a convenient trial unit,' particularly in that the various 'claims' and legal theories were predicated exclusively on [the employee's] employment relationship with [the company]. By permitting the instant case to proceed, the district court allowed 'precisely the sort of piecemeal litigation, unnecessary expense, and waste of judicial resources that the doctrine of res judicata is designed to prevent.'

Id. at 1239-40.

Consequently, Mr. Stephens is barred from further litigation involving any claim that he could have brought when he filed *Stepehens I* and *Stephens II*. Under the Age Discrimination in Employment Act, Mr. Stephens may file suit in federal district court thirty days after he notifies the EEOC of his intent to sue. 29 U.S.C. § 633a(d). The district court may consider retaliation or reprisal claims relating to discrimination claims that

have been resented to it for resolution on other grounds. *Almendral v. New York State Office of Mental Health*, 743 F.2d 963, 967 (2d Cir. 1984). Thus, all claims relating to the Regional Attorney selection and the February 26, 1986 denial of Mr. Stephens' request for reconsideration of the rejection of his grievance are barred. In addition, all claims of retaliation occurring before the filing of *Stephens II*, as well as claims based on age that could have been brought in that case are barred. Consequently, Mr. Stephens cannot complain here about the Chief Counsel selection. In sum, the only matters that are not barred by *res judicata* are the changes in the Deputy Chief Counsel positions and the allegation concerning the denial of his request for reconsideration of the rejection of his grievance on July 24, 1988.[8]

III. The Complainant Has Not Established Even A Prima Facie *Case Of Reprisal For The Regional Attorney Selection*

The complaint alleges that Ms. Dunst retaliated against him for prior protected activity when she did not recommend him for the Regional Attorney position. According to Mr. Stephens,

> Over the last five to six years, I have been approached by Ms. Dunst when she visited Atlanta or when I was in Washington in the guise of concern for Mr. Harper's

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[8] Consequently, further litigation in court on any of these matters would clearly be barred as unduly duplicative of matters already raised in that forum. Thus, proper application of the principles of economy, efficiency, and consistency mandate that the complaint be dismissed at this point.

> health. She would ask if he was really capable of performing the duties of Regional Attorney and if he could be trusted to carry out policies set by the Secretary or the General Counsel. My response on these occasions was that he had had only temporary problems, primarily episodes of high blood pressure but that he retained a sharp legal mind, able to recall the facts of cases in detail and the principles central to their resolution.

(First ROI, Ex. 4 at 4; *see also* Second ROI, Ex. 14 at 8.) Mr. Stephens believes that Ms. Dunst "was attempting, on these occasions, to elicit information from me that could be used to force Mr. Harper from his job because of age." (First ROI, Ex. 2 at 2.)

Section 704(a) of Title VII, 42 U.S.C. § 2000e-3(a), states:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees ... because he has opposed any practice made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or 29 C.F.R. § 1613.214(a)(1)(i). *See also id.* at § 1613.262(b). Therefore, in order to comply with the regulation, Mr. Stephens was required to initiate EEO counseling within 30 days of the February 26, 1986 denial of the request for reconsideration of the rejection of Mr. Stephens' grievance, or March 27, 1986. However, Mr. Stepehens did not seek EEO counseling until October 30, 1986 — more than eight months after the denial. (OSH-68-87

and OSH-55-89 Consolidated ROI Ex. 1 at 9.) Thus this complaint is clearly untimely, and the administrative judge should recommend that the agency cancel this issue pursuant to 29 C.F.R. § 1613.215(a)(4).

CONCLUSION

For the reasons stated above, the administrative judge should issue an order directing the complainant to show cause why a decision should not be issued without a hearing.

Respectfully submitted,

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for Elizabeth Jordan Gianturco
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Agency Representative.

CERTIFICATE OF SERVICE

I certify that on this 15th day of April, 1992, I caused a true copy of the foregoing Agency's Motion for Decision Without a Hearing, with attachments, to be served by hand upon

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Supreme Court, U.S.
FILED
JUN 6 1994
OFFICE OF THE CLERK

No. 93-1629

In the Supreme Court of the United States

OCTOBER TERM, 1993

JAMES N. STEPHENS, ETC., PETITIONER

v.

DONNA E. SHALALA,
SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the doctrine of res judicata applies in suits brought under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e *et seq.*

2. Whether, assuming that res judicata applies to Title VII cases, petitioner's prior suit involved "the same nucleus of operative facts" as his present action.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The per curiam decision of the court of appeals (Pet. App. 1a) is unpublished but is noted at 9 F.3d 121 (Table). The opinion of the district court (Pet. App. 1b-9b) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 9, 1993. A petition for rehearing was

denied on January 7, 1994. Pet. App. 1f.[1] The petition for a writ of certiorari was filed on April 7, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1985 petitioner, then a deputy regional attorney and acting regional attorney at the Department of Health and Human Services (HHS), applied for a permanent position as regional attorney. When petitioner was not selected for the position, he filed two grievances with HHS's Office of General Counsel (OGC), objecting to certain procedures used in the selection process.[2] While his grievances were pending, petitioner also filed an Equal Employment Opportunity (EEO) complaint, alleging discrimination on the basis of age. Pet. App. 2b.

Because petitioner was a supervisory employee, his grievances were processed under Office of Personnel Management (OPM) and HHS regulations covering nonbargaining unit workers. Pet. App. 3d, 9d. Pursuant to the then-applicable OPM regulation defining "Grievance coverage" (5 C.F.R. 771.205 (1992)), petitioner was entitled to grieve "any matter of concern or dissatisfaction relating to the employment of

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[1] Petitioner filed a Suggestion of Rehearing En Banc, which under the Eleventh Circuit's rules is considered to be a petition for rehearing as well. See 11th Cir. R. 35-6; see also *Missouri* v. *Jenkins*, 495 U.S. 33, 50 (1990).

[2] Petitioner also filed additional grievances challenging other personnel actions: (1) His non-appointment to "the new position of Chief Counsel-SES"; (2) the elimination of his position as Deputy Chief Counsel; and (3) his non-appointment to "two newly created positions of Deputy Chief Counsels." Pet. 6.

an employee which is subject to the control of agency management, including any matter on which an employee alleges that coercion, reprisal, or retaliation has been practiced against him or her," except those set forth in 5 C.F.R. 771.206(c) (1992). Among the matters excepted from grievance under that regulation were (1) the non-selection for promotion from a group of properly ranked and certified candidates or failure to receive a noncompetitive promotion, 5 C.F.R. 771.206(c)(iii) (1992), and (2) any decision which is appealable to the Merit Systems Protection Board or subject to final administrative review by the Office of Personnel Management or the Equal Employment Opportunity Commission (EEOC). 5 C.F.R. 771.206(c)(ii) (1992).[3]

Petitioner's grievance was denied on the ground that non-selection for promotion is not covered by the grievance process. Petitioner subsequently requested formal grievance processing, including an investigation and hearing. When HHS denied the formal proc-

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[3] The current version of the regulation excludes "[a] matter * * * in which the employee is entitled to file an appeal or other formal challenge for which the following organizations have authority to grant a remedy: * * * the Equal Employment Opportunity Commission." 5 C.F.R. 771.105(b)(2) (1993).

HHS's Personnel Instruction Manual notes that 5 C.F.R. 771.206(c)(ii) (1992) excludes complaints of discrimination from grievance coverage. The Manual accordingly provides that "a grievance concerning a matter or matters about which the employee has filed a formal complaint of discrimination must be rejected, either wholly or partially as appropriate." Pet. 3. In an explanatory parenthetical, the Manual states that where a grievance covers "more than one matter * * *, only those matters for which discrimination has been alleged must be rejected." *Ibid.*

essing, he requested reconsideration. This was denied on the ground, *inter alia*, that petitioner had filed an EEO complaint on the same matter.[4] Pet. App. 2b, 5d; Pet. 6-7.

Petitioner also filed two suits in federal district court—one against HHS, and one against Terry Coleman and Isabel Dunst, two officials in the OGC who had served on the selection board for the regional attorney position.[5] Pet. App. 2b. Petitioner's complaints in these cases alleged, *inter alia*, "that reconsideration of the grievance was denied because of his having filed a discrimination complaint, in violation of 5 C.F.R. § 771.302(c)(1) assuring freedom from reprisal." Pet. App. 3b.

The suit against HHS was dismissed under Fed. R. Civ. P. 12(b)(6) on the ground that the Civil Service Reform Act (CSRA) provided the exclusive remedy for contesting petitioner's non-selection for the position of regional attorney. Pet. App. 3b. The suit against Coleman and Dunst was dismissed as well. *Id.* at 2b-3b. The Eleventh Circuit affirmed. *Stephens* v. *Department of Health & Human Services*, 901 F.2d 1571, cert. denied, 498 U.S. 998 (1990).

Petitioner subsequently challenged HHS's policy of rejecting all grievances arising from personnel actions that are the subject of discrimination complaints. He filed an EEO class complaint (Pet. App. 3b), al-

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[4] Petitioner then filed individual EEO complaints, claiming unlawful retaliation for his having filed the EEO discrimination complaint. Pet. App. 2b.

[5] The complaint against the individual defendants sought essentially the same relief as that against HHS, to the extent that relief was unavailable against the agency. *Stephens* v. *Department of Health & Human Services*, 901 F.2d at 1574.

leging that "he and others have been subjected to retaliation for filing EEO complaints." *Id.* at 7e. That complaint was rejected because it (1) was not within the purview of 29 C.F.R. 1613.601 *et seq.* ("Class Complaints of Discrimination"),[6] (2) was untimely filed, and (3) failed to show the existence of a sufficiently numerous class. Pet. App. 16e.

2. Petitioner then filed the present class action in federal district court, claiming that the HHS policy of not accepting a grievance when the grievant has already filed a discrimination complaint amounts to retaliation forbidden by the Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e *et seq.*[7] Pet. App. 1g-6g. The district court held that petitioner's suit was barred by res judicata and granted HHS's motion for summary judgment. *Id.* at 8b-9b. Noting that the doctrine of res judicata "precludes the parties or their privies from relitigating issues that were or could have been raised" in the prior action, *id.* at 6b (quoting *Allen* v. *McCurry*, 449 U.S. 90, 94 (1980)), the district court set forth the "four elements" that "must be present" for the doctrine to apply: "(1) a final judgment on the merits rendered in the previous suit; (2) the judgment was rendered by a court of competent jurisdiction; (3) the parties, or those in privity with them, are identical in both cases; and (4) the same cause of action is involved in both cases." Pet. App. 6b-7b.

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[6] The EEOC Administrative Judge concluded that the Commission's regulations did not permit the filing of a class action alleging retaliation. Pet. App. 12e-13e.

[7] The complaint further alleged that the policy violates 5 C.F.R. 771.201 *et seq.* and HHS's "own regulation HHS 771-3" (Pet. App. 5g), and thereby denies petitioner and other class members "administrative due process." *Ibid.*

The court explained that a dismissal under Fed. R. Civ. P. 12(b)(6) constitutes a "[final] judgment on the merits." Pet. App. 7b. The court also noted that "[i]f [the original] claim is litigated by a[n] individual, filing a subsequent suit as a class action will not prevent the application of res judicata." *Ibid.* Finally, the court emphasized that "if a case arises out of the same nucleus of operative fact, or is based upon the same factual predicate, as a former action, the two cases are really the same claim or cause of action for purposes of res judicata." *Id.* at 7b-8b (internal quotation marks, emphasis, and ellipsis omitted).

The court held that petitioner's "prior suit[s] against HHS and against Coleman and Dunst meet all four criteria." Pet. App. 8b. Both suits were dismissed under Rule 12(b)(6) "and thus were adjudicated on the merits"; as the Eleventh Circuit had noted, jurisdiction in the earlier actions had been proper "based on 28 U.S.C. § 1331"; and the parties in the present suit were identical to those in the prior litigation. Pet. App. 8b. Finally, the court observed that "both the [present] case and the prior suits arose from [petitioner's] allegations that his grievance was wrongfully denied because of his having also filed a discrimination complaint." *Ibid.* The district court therefore granted the government's motion for summary judgment. *Id.* at 9b. The court of appeals affirmed in an unpublished per curiam order. *Id.* at 1a.

ARGUMENT

1. Petitioner contends that the application of res judicata to a Title VII case is inconsistent with this Court's decision in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974). However, *Alexander* did not address the res judicata effect of a prior *district court* judgment. Rather, that case considered only "the proper relationship between federal courts and the grievance-arbitration machinery of collective-bargaining agreements in the resolution and enforcement of an individual's rights to equal employment opportunities under Title VII." 415 U.S. at 38. The Court held that the prior arbitral decision denying a dismissed employee's claim of racial discrimination under the nondiscrimination clause of a collective-bargaining agreement did not foreclose his right to trial de novo under Title VII. *Id.* at 59-60. The Court recognized "[t]he distinctly separate nature of [the employee's] contractual and statutory rights," *id.* at 50; it emphasized as well "the union's exclusive control over the manner and extent to which an individual grievance is presented," *id.* at 58 n.19, noting that "[i]n arbitration, as in the collective-bargaining process, the interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit." *Ibid.*[8] These concerns

[8] This Court has recently explained that "because the arbitration in [*Alexander* and two related cases] occurred in the context of a collective-bargaining agreement, the claimants there were represented by their unions in the arbitration proceedings. An important concern therefore was the tension between collective representation and individual statutory rights." *Gilmer* v. *Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647, 1657 (1991). See also *Emporium Capwell Co.* v. *Western Addition Community Org.*, 420 U.S. 50, 75 (1975) (the

have no application in the present setting: petitioner had access to a judicial forum in his prior lawsuits, and he was in full control of the earlier litigation.

The decision more closely on point is *Kremer* v. *Chemical Construction Corp.*, 456 U.S. 461 (1982). In *Kremer* the Court held that a prior state court judgment was entitled to preclusive effect, pursuant to 28 U.S.C. 1738, in plaintiff's Title VII suit. 456 U.S. at 466-478. The Court observed that "[i]n our system of jurisprudence the usual rule is that merits of a legal claim once decided in a court of competent jurisdiction are not subject to redetermination in another forum." *Id.* at 485. The Court found nothing in the text or legislative history of Title VII suggesting an exception to this rule of adjudication, *id.* at 470; to the contrary, the Court noted, one exchange on the Senate floor reflected the assumption that res judicata would apply in Title VII suits. *Id.* at 475-476. The Court distinguished *Alexander*,

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Court "held in *Alexander* * * * that a union may not circumscribe an employee's opportunity to seek relief under Title VII"). Cf. *General Telephone Co.* v. *EEOC*, 446 U.S. 318, 332-333 (1980) (individual employee's Title VII suit is not precluded when EEOC obtains classwide relief in its own enforcement action).

Petitioner relies upon this Court's statement that "[t]he policy reasons for rejecting the doctrines of election of remedies and waiver in the context of Title VII are equally applicable to the doctrines of *res judicata* and collateral estoppel." Pet. 16 (quoting *Alexander*, 415 U.S. at 49 n.10). Read in context, however, that statement means simply that a prior arbitral decision cannot preclude an employee's Title VII suit regardless of whether the basis for preclusion is characterized as election of remedies, waiver, res judicata, or collateral estoppel. See 415 U.S. at 49 n.10 ("Whatever doctrinal label is used, the essence of these holdings remains the same.").

noting that the holding in that case "was that a private arbitration decision concerning an employment discrimination claim did not bind the federal courts." *Id.* at 477. Although *Kremer* involved a prior state court judgment, there is no reason for denying the judgment of a federal district court similar preclusive effect.

The two courts of appeals to address the issue have held that federal court judgments are entitled to res judicata effect in subsequent Title VII actions. In *Herrmann* v. *Cencom Cable Associates*, 999 F.2d 223, 225 (7th Cir. 1993), the Seventh Circuit concluded that "[p]arties to Title VII actions enjoy no immunity from res judicata." Similarly, in *Woods* v. *Dunlop Tire Corp.*, 972 F.2d 36, 39 (2d Cir. 1992), cert. denied, 113 S. Ct. 977 (1993), the Second Circuit held that "the language and policy of Title VII do not undercut the application of res judicata." Cf. *Gutzwiller* v. *Fenik*, 860 F.2d 1317, 1332-1333 (6th Cir. 1988) (where plaintiff sues under both 42 U.S.C. 1983 and Title VII, jury's finding of discriminatory intent in Section 1983 suit has preclusive effect, and trial court may not issue contrary finding in ruling on Title VII claim); *Garza* v. *City of Omaha*, 814 F.2d 553, 557 (8th Cir. 1987) (same).

The decision of the Sixth Circuit in *Lyght* v. *Ford Motor Co.*, 643 F.2d 435 (1981), is not to the contrary. Although the *Lyght* court stated in dictum that "the doctrines of *res judicata*, collateral estoppel and election of remedies normally do not apply in Title VII actions," 643 F.2d at 438, its holding was much more limited. The court held only that the settlement of a discrimination complaint filed with the Michigan Civil Rights Commission (MCRC) did not bar plaintiff's subsequent Title VII action. The

court emphasized that while "Title VII evinces a congressional preference for conciliation over litigation, the fact remains that a person who claims injury from discrimination in employment practices is entitled to a hearing in federal court." *Id.* at 441. The court further explained that "[t]hough the MCRC adjustment may fairly be treated as a knowing and voluntary partial settlement by Lyght * * *, it is insufficient to constitute a waiver of his right to seek a complete remedy in a federal court." *Ibid.* Those concerns have no relevance to the present case, where petitioner's challenge to the denial of his grievance was asserted in a prior federal lawsuit.

2. Petitioner also argues that, even if res judicata principles apply to Title VII suits, the district court's application of those principles in this case conflicts with the decision in *Herrmann* v. *Cencom Cable Associates, supra.* In *Herrmann* the Seventh Circuit stated that

> [in] the typical retaliation case, * * * an employee files a claim based on some set of facts and then the employer fires him for filing the claim, precipitating a second claim. They are two claims, not one, for puposes of res judicata. While it is true in such a case that, but for the filing of the first claim, there would not have been a second claim, the two claims are based on (largely) different facts: the first claim on whatever facts gave rise to that claim, the second claim on the filing of the first claim and the employer's response to that filing.

999 F.2d at 227 (citation omitted).

The district court's approach in the present case does not conflict with that analysis. The district court

did not hold that petitioner's suit was barred simply because his claim of retaliation would not have arisen "but for" his non-selection as regional attorney. Rather, the court determined that petitioner's claim of retaliation had actually been asserted in the prior litigation: the court explained that "both the [present] case and the prior suits arose from [petitioner's] allegations that his grievance was wrongfully denied because of his having also filed a discrimination complaint." Pet. App. 8b. Thus, the present suits "arose from the same nucleus of operative facts as the prior suits" and "involve[d] the same cause of action as the prior suits." *Ibid.* Accord *Herrmann*, 999 F.2d at 226 ("two claims are one for purposes of res judicata if they are based on the same, or nearly the same factual allegations"); *Woods*, 972 F.2d at 38-39 ("Essentially the same underlying occurrence was relevant to both the [prior] and Title VII claims.").[9]

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[9] Petitioner does not attempt to explain why the difference between his current claim (that he was the subject of a "secret uniform practice on grievance rejection," Pet. 21) and his original claim (that "his own grievances had been rejected for having filed EEO claims," *ibid.*) has any significance in the application of res judicata principles. In any event, there was nothing "secret" about the policy, since 5 C.F.R. 771.206(c)(ii) (1992) excluded from grievance coverage any decision that was appealable to the MSPB, OPM, or EEOC. Indeed, HHS's June 24, 1988, letter to petitioner, see Pet. App. 5d, specifically described the agency's policy.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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